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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	**01-0539**
Implementation of Section 13-712(g) of the	:	
Public Utilities Act.	:	

ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

By the Commission:

The Commission commenced this rulemaking on August 8, 2001, to implement the directive in Section 13-712(g) of the Public Utilities Act (the "Act") that "[t]he Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules." (220 ILCS 5/13-712(g)).

Leave to Intervene was granted to the following parties: Ameritech Illinois, ("Ameritech"), Allegiance Telecom of Illinois, Inc., ("Allegiance") AT&T Communications of Illinois, Inc., ("AT&T") TCG Chicago, Inc., and TCG St. Louis, Inc., Citizens Telecommunications Company of Illinois, ("Citizens") Gallatin River Communications, L.L.C., Illinois Telecommunications Association, ("ITA") Verizon North Inc. and Verizon South Inc., (jointly, "Verizon") Illinois Consolidated 21st Century, MCI World Com, ("WorldCom") McLeodUSA Telecommunications Services, Inc., ("McLeod") Nuvox Communications of Illinois, Inc., ("Nuvox") RCN Telecom Services of Illinois, Inc., ("RCN") TDC Metrocom, L.L.C., ("Metrocom") the Illinois Independent Telephone Association ("IITA"), Focal Communications Corp., ("Focal") XO Illinois, Inc., ("XO") the Illinois Rural Competitive Alliance, (the "IRCA") Sprint Communications L.P., PrimeCo Personal Communications, U.S. Cellular, Inc. and VoiceStream Wireless Corp., (jointly, the "Wireless Coalition") and the Commission Staff ("Staff").

Workshops were held on August 30, 2001 September 26, 2001; October 16, 2001; November 7, 2001; January 23, 2002; March 7, 2002; and April 11, 2002. Evidentiary hearings were conducted on July 23 and 24, 2002, and August 13, 2002. At the hearing, the testimony of the witnesses set forth below admitted into the record: David Meldazis, Senior Manager of Regulatory Affairs of Focal, on behalf of Focal; Rod Cox, Manager, Carrier Relations, TDS Metrocom, in support of Allegiance, TDS Metrocom, McLeod, Nuvox and RCN (collectively, "Allegiance.") In support of the IRCA, Jason P. Hendricks, Senior Consultant, GVNW consulting testified. In support of AT&T, Karen Moore, Manager, Performance Measures, Local Services and Access Management, testified.

In support of WorldCom, the following witnesses testified: Karen Furbish, Principal Analyst, Access Services, at WorldCom, and Faye Raynor, Director of Regulatory Support, Wholesale Performance Assurance. In Support of Verizon, the following witnesses testified: Louis Agro, Director of Verizon's Wholesale Performance Assurance Group; Jerry Holland, Vice-President of Process Improvement at Verizon. In support of the Wireless Coalition, the following witnesses testified: Carl Hansen, of Hansen Communications Consulting, David Schmoker, Manager of the Regional Network Engineering Department of U.S. Cellular, Inc., Doug Blake, Director of Network Operations of U.S. Cellular, Inc., Rajesh Tank, Executive Director of Engineering and Operations, Voice Stream Wireless; Lester M. Tsuyuki, Manager of the Telecommunications and Regulatory Department of PrimeCo Personal Communications; and Robert J. Jakubek, Director of Operations, U.S. Cellular., Inc. In support of Citizens, the following witnesses testified: Kim Harber, Citizens' Vice-President and General Manager, and Kenneth Mason, Citizens' Manager of Interconnection. The following witnesses testified on behalf of Ameritech: Richard Dobson, the Director of Network Performance at Ameritech; Eric Panfil, Director of Network Technologies and New Services, Ameritech Illinois, and James Ehr, Director, Performance Measures for Ameritech; Terry Spieckerman, Business Service Representative at Ameritech Illinois. The following witnesses testified on behalf of Staff: Samuel McClerren, Engineering Analyst in the Commission's Engineering Department of its Telecommunications Division; Russell Murray, a Utility Analyst in the Commission's Telecommunications Division; Alcinda Jackson, a Consumer Policy Analyst in the Commission's Consumer Services Division; Kathy Stewart, an Engineering Analyst in the Commission's Telecommunications Division; Melanie Patrick, Ph.D., a Policy Analyst in the Policy Division of the Commission's Telecommunications Department; The previously-mentioned parties filed post-trial briefs and post-trial reply briefs.

The text of the proposed rule that was initiated by Staff was initially presented at Attachment 1.1 to the direct testimony of Staff witness Samuel S. McClerren. The parties subsequently introduced several modifications to that rule. For the sake of brevity, this Order discusses the last proposal made on any portion of the Rule. Also for the sake of brevity, only the subsections of Sections of Part 731 are referred to herein. For Example, Section 731.105 is referred to as Section 105.

Background: The General Framework of the Rule

The Rule proposed by Staff has four "tiers" of telecommunications carriers, or "Levels." The carriers that provide the most wholesale service, the Incumbent Local Exchange Carriers ("ILECs") with 400,000 or more access lines (Ameritech and Verizon) are Level 1 carriers. All other ILECs, of which, there are three in Illinois, are Level 2 carriers. Rural Incumbent Local Exchange Carriers that are subject to the rural exemption are classified as Level 3 carriers. All other LECs, or CLECs, ("Competitive Local Exchange Carriers") are classified as Level 4 carriers.

The Rule requires Level 1 carriers, who already have Wholesale Service Quality Plans that were developed as a result of merger commitments, (Ameritech and Verizon) to use Commission-approved Wholesale Service Quality Plans as their rules for wholesale service quality performance. The Rules further provide a procedure for Commission approval of, and periodic review of, such Plans.

With respect to Level 2 carriers, a more limited set of measures are imposed than those found in Level 1 Wholesale Service Quality Plans. Level 4 carriers provide little wholesale service. Level 4 carriers are subject to three performance measures and some remedies.

The performance standards in the Rule are referred to as measures. These standards evolved after extensive workshops; they further evolved through the course of this proceeding. Generally, these measures concern timeframes for provisioning services, for maintenance and repair and for the transition that occurs when and end-user customer switches carriers. These measures also concern what information a carrier must supply to another carrier in a given situation. Failure to meet the measures can result in a payment, or in the issuing of a credit on a future bill, depending on the measure breached. However, the Rule also provides that carriers are excused from performance within designated timeframes, if failure to perform was due to A circumstance beyond the provisioning carrier's control, such as a tornado, acts of terrorism, or actions of the end-user.

I. Issues Applicable to All Carriers

a.) Section 105: AT&T's Revised Definition of "Resold Local Services"

AT&T's Position

AT&T seeks to amend the definition of "Resold Local Services" so that it would be identical to the definition found in the Section 13-211 of the Public Utilities Act, (the "Act") which provides that resold telecommunications services are the "offering or provision of telecommunications services primarily through the use of services or facilities owned or provided by a separate telecommunications carrier." (220 ILCS 5/13-211) (AT&T Initial Brief at 14; *See also,* Appendix, Sec. 105).

No party objected to AT&T's proposed change to the Rule.

Commission Analysis and Conclusions

Currently, the Rule provides that Resold Local Services are "[t]he sale, for purposes of resale, of a complete telecommunications path (i.e., switch, port, and loop and associated support (e.g., 911, OS/DA) by a facilities based carrier to another carrier." (Appendix, Sec. 105). We agree with AT&T that its definition, which is wider, and is therefore, more all-inclusive, is the better definition of "Resold Local Services." Moreover, we should avoid possible discrepancies between the Rule and statutes.

Section 105 will be amended to provide that Resold Local Services are:

> the offering or provisioning of telecommunications services primarily through the use of services or facilities owned or provided by a separate telecommunications carrier.

b.) Section 105: Citizens' Revised Definition of "Telecommunications Carrier"

The Position of Staff

Currently, the Rule includes advanced services in its requirements concerning unbundled local loops. (*See, e.g.,* Appendix, Section 105).

The Position of Citizens

Citizens seeks to revise the definition of "telecommunications carrier" in Section 105 to exclude advanced services as follows:

> Unbundled Local Loop' means the physical connection for the end user's premise to the carrier's point of presence, excluding switching or ports, provided by one carrier to another carrier. For purposes of this Code Part 731, Unbundled Local Loop is limited to analog loops used to provide 'basic local exchange services' as defined in 220 ILLCS 5/13-712(b).

(Citizens' Initial Brief at 11).

The Position of the IRCA

The IRCA posits that the General Assembly's omission of the term "basic local exchange services" from Section 712(g) establishes a legislative intent to adopt wholesale service quality standards for more than just loops used to provide basic local exchange services. It concludes the definition of telecommunications services in the Rule should not be defined to exclude loops for advanced services. (IRCA Reply Brief at 10).

Commission Analysis and Conclusions

The issue of provisioning advanced services with regard to unbundled local loops is fully addressed in Section IV(h) herein, the portion of this order that is entitled

"Unbundled Local Loops for Advanced Services." For the reasons set forth in that Section of the order, we decline to restrict the definition of unbundled local loops to exclude advanced services.

c.) Section 105: Citizens' Revised Definitions of "Wholesale Service" and "Carrier to Carrier Wholesale Service Quality'

The Position of Citizens

Citizens seeks to Revise Section 105 of the Rules to provide:

> 'Carrier to carrier wholesale service quality' means the level of quality of telecommunications services, measured pursuant to the Standards and Measures adopted in this Part, that one telecommunications carrier sells or provides to another telecommunications carrier pursuant to an interconnection agreement for the latter carrier's use in providing basic local exchange service to end users.
>
> 'Wholesale Services' means any telecommunications service that one telecommunications carrier sells or provides to another telecommunications carrier pursuant to an interconnection agreement for use in providing basic local exchange services to end users.

(Citizens' Initial Brief at 11).

The Position of the IRCA

The IRCA maintains that ILECs are required to provide unbundled network elements to CLECs, ("UNEs") irrespective of whether there is an interconnection agreement between the two. Thus, the IRCA concludes that the Rule should not limit the definitions of "carrier to carrier wholesale service quality" and "wholesale services" to situations including interconnection agreements. The IRCA also contends that the Rule should not be limited to basic local exchange services, as the General Assembly omitted "basic local exchange services" from the enabling statute, Section 712(g). It reasons that because such a terms is absent from the enabling statute, the Rule is not limited to "basic local exchange services.' (IRCA Reply Brief at 9-10).

Commission Analysis and Conclusions

For reasons that will be discussed addressing the arguments concerning the scope of this proceeding as it relates to wholesale special access service, Section II(g)(2), we conclude that the Rule governs services that are provided to a carrier for its provision of "basic local exchange services," which is not the same thing as what Citizens proposes, which is, services that are, in and of themselves, basic local exchange services." We decline to alter the definitions of "carrier to carrier wholesale service quality" and "wholesale services."

We also decline to add language that requires interconnection agreements. We see no need to require that the parties enter into a formal interconnection agreement to memorialize their respective duties and obligations.

d.) Section 105: WorldCom's Revised Definition of "Wholesale Service"

WorldCom's Position

The Rule defines "wholesale service" as:

> Any telecommunications service subject to the Commission's jurisdiction that one carrier sells or provides to another carrier, as a component of, or for the provision of, telecommunications services to end users.

(Appendix, Sec. 105).

WorldCom seeks to delete the phrase "subject to the Commission's jurisdiction" from that definition. WorldCom argues that such deletion should allow the Commission to review and evaluate Level 1 carriers' performance in providing interstate special access services, as well as intrastate special access services to themselves, their end-users and other carriers. (WorldCom Initial Brief at 3-4). Without the ability to review this data, WorldCom reasons, the Commission and purchasers of wholesale special access will be unable to determine if Level 1 carriers are discriminating when provisioning such services. Also, the Commission will be unable to review the performance that impacts upon services provided to Illinois end-user customers that rely on Level 1 carrier interstate special access circuits. WorldCom points out that special access circuits may technically be interstate services, even when they carry as much as 90% intrastate traffic and are physically located wholly inside the state. (*See,* WorldCom Ex. 1.0 at 4-5). WorldCom urges the Commission to join the growing number of state Public Utility Commissions that have required ILECs to report both intrastate and interstate special access performance. (*Id.* at. 8).

The Position of Staff

Staff opines that the Rule should only encompass intrastate services.

Commission Analysis and Conclusions

We decline to adopt WorldCom's definition of "Wholesale Service." The only reason mentioned by WorldCom for the change is the additional reporting requirements regarding interstate services, which we do not regulate. We decline at this time to require such reporting requirements.

e.) Section 105: Ameritech's Proposal to Change the Definition of "Maintenance and Repair"

Ameritech's Position

Ameritech seeks to delete the phrases "view status history" and "receive proactive status on trouble reports" from the Rule's definition of "Maintenance and Repair" in Section 105. Ameritech argues that these phrases add nothing to the Rule. (Ameritech Initial Brief at 30).

Staff's Position

Staff opposes deleting the phrases because those phrases help explain what is contemplated by "maintenance and repair." However, Staff is willing to provide additional clarification; it proposes the following revised language:

'Maintenance and Repair' means the actions taken or functions used to create trouble reports, view <u>or determine trouble report status, and trouble report history</u>, receive proactive status <u>on trouble</u> reports, and clear and close trouble reports.

Commission Analysis and Conclusions

It appears that Staff has re-phrased this definition to address Ameritech's concern. Staff's revised definition of "Maintenance and Repair" in Section 105 Rule will be adopted. (Appendix, Sec. 105).

f.) Section 110: the Articulated Goals of the Regulation

The Goals articulated in Section 110 are set forth in the Public Utilities Act. Section 110 adds nothing to these goals, as it requires nothing, and it contains no substantive language. Therefore, it should be eliminated.

g.) Section 900: (Renumbered as Section 905) Notice of Termination

Background

Section 905 requires written notice to be given by a provisioning carrier to the requesting carrier and the Commission, no less than 35 days prior to termination, discontinuance or abandonment of a wholesale service.

Staff's Position

Staff contends that Section 905 was designed to provide a clear minimum notice requirement before wholesale service is terminated so that: (i) the requesting carrier and the provisioning carrier will have a prescribed amount of time to resolve the issue(s) causing termination; or (ii) if such issue(s) cannot be resolved, to allow sufficient time for the requesting carrier to notify its end-user customers who will lose service as a result of the termination of the wholesale service. Staff argues that Section 905 does not address credit and collection issues; instead, it addresses disconnection of wholesale services for any reason. (Staff Reply Brief at 17).

Staff points out that in the wholesale context, the end-user customer is a completely innocent third party, which is entirely different from the situation involved in the retail context. (Staff Ex. 6.0 at 2-3; Reply Brief at 17). Staff posits that although wholesale service quality is often thought of in terms of the relative level of service provided, service quality necessarily includes those situations in which service does not exist for whatever reason. Therefore, the manner in which and the procedures by which service is terminated is also subject to service quality standards.

Staff maintains that 35 days notice allows at least five days for the requesting carrier to provide 30 days notice to its customers, when such notice is required pursuant to Section 13-406 of the Act. Staff also points out that, if there is any basis to stay or suspend the proposed termination or seek other relief, 35 days will provide time for the requesting carrier to seek any relief before a court or the Commission. (Staff Ex. 6.0 at 4; Appendix, Sec. 905).

The Position of Focal

Focal strongly supports Staff's proposal; it only recommends one change, that is, 40 days notice, rather than 35 days notice. Focal views Staff's proposed 35 day period as not enough time to protect the consumer, allow a purchasing carrier to seek legal redress, if need be, and make alternative arrangements to serve customers. Also, purchasing carriers need time to provide end-user customers the five days notice that is required by Part 735. (Focal Initial Brief at 2-3).

Focal points out that interruptions or terminations of wholesale service do not merely affect the purchasing carrier; they also result in end-user customers losing their service. Thus, Section 905 helps ensure that end-users do not suffer any unexpected and abrupt loss of telephone service brought about by a situation in which the end-users did not participate—a dispute between two carriers. (Focal Initial Brief at 1-2). In the past, Focal has experienced billing disputes with wholesale carriers and, if services had been terminated, numerous Focal customers would have lost their telephone services. (*See,* Focal Ex. 1.0 at 4-5).

Focal argues that wholesale service can be terminated for a variety of reasons, only some of which, include non-payment by the purchasing carrier. Focal posits that time is needed for the purchasing carrier to explore its legal options and to explore alternative ways to provide service to customers. (Focal Reply Brief at 3).

The Position of Allegiance

Allegiance supports inclusion of Section 905 in the Rule. It points out that the Rule does not prevent a wholesale provider from negotiating deposit and credit terms to protect its interests. It avers that nothing could be a more significant component of wholesale service than the notice a wholesale provider must give before terminating service. (Allegiance Reply Brief at 19).

The Position of Ameritech

Ameritech opposes including Section 905 in the Rule. Ameritech views this provision as beyond the scope of this docket, which concerns wholesale service quality. It posits that Section 905 relates to credit and collection issues, which, normally are in rules that are different from service quality rules. (Ameritech Initial Brief at 4, 22). Ameritech also views this issue as one concerning whether purchasing carriers have the financial resources to pay their bills and whether they intend to pay them, thus, it concludes that Section 905 exposes provisioning carriers to bad debt. (Ameritech Ex. 1.10 at 4).

Ameritech contends that it already provides sufficient notice. Currently, Ameritech's notice rule is that it may not send a notice of disconnection until at least 15 days after a bill's due date, and that notice must provide for at least 10 business days before service is discontinued, but, in no case can service be discontinued prior to 31 days after the bill is due. Also, service cannot be discontinued when the carrier raises a bona fide dispute concerning a bill incurred during that time period. (Ameritech Initial Brief at 22, 23).

Ameritech further posits that Section 905 is not sound policy because it interferes with the ability of carriers to negotiate their own terms. It reasons that sophisticated carriers are fully able to understand, negotiate and agree upon discontinuance terms; they do not need the same Commission intervention or pre-set rules that retail end-users might need. (*Id.* at 24-25).

Commission Analysis and Conclusions

We disagree with Ameritech that the notice requirement in Section 905 relates to credit, billing and collection issues. By its terms, Section 905 applies to any situation where a provisioning carrier is terminating wholesale service to a requesting carrier for any reason. (Appendix, Sec. 905). Therefore, any termination, irrespective of the reason, is covered by the Section 905 of the Rule. As Staff and Focal point out, termination can occur for many reasons, several of which, have nothing to do with a billing dispute. And, as Allegiance points out, wholesale providers can negotiate sufficient credit, deposit and like terms to protect their interests.

However, there may be situations in which 35 days is too much time to adequately protect the provisioning carrier. Such situations are best known to individuals purchasing and selling wholesale service, and should be negotiated by those persons, when possible.

That does not mean that Staff's position, and that of Focal, is invalid. Both parties established that there have been, and will be, situations in the future, in which, requesting carriers will need some time to protect their customers from termination of service. The reality is that wholesale customers are dependent upon the carriers from which they purchase services, and, as a result, the potential is there for the end-user consumers to suffer as a result. We therefore are of the opinion that Section 905 should be a "default provision, " one that is in effect when nothing else has been agreed to by the carriers. In this way, Focal's concerns that 35 days is insufficient is also addressed. We therefore amend Section 905 to provide, in pertinent part, as follows:

> <u>Except where otherwise agreed to, in writing, by the parties,</u> [n]o Provisioning Carrier offering or providing Wholesale Service to a Requesting Carrier shall terminate, discontinue or abandon such service once initiated except upon at least 35 days prior written notice (the "Termination Notice") to the Commission and the Requesting Carrier. . .

(Appendix, Sec. 905).

II. Issues Applicable to Level 1 Carriers

a) Sections 200, 220 and 230: (Renumbered as Sections 205, 220 and 230) Level 1 Carriers and Wholesale Service Quality Plans

Background

Level 1 carriers have Wholesale Service Quality Plans that were developed as a result of merger commitments. Level 1 carriers must file their Wholesale Service Quality Plans and tariffs on April 1, 2004, and every 2 years thereafter for Commission review. (Appendix, Sec. 205(a)). Carriers with preexisting plans must use those plans from the effective date of the Rule through the effective date of the tariff. (Appendix, Sec. 230(b)).

Ameritech's Position

Essentially, Ameritech objects to Section 230(b), which requires carriers with preexisting Wholesale Service Quality Plans to be in effect through April 1, 2004. It contends that the structure of payments under its preexisting Plan, the Plan that was ordered as a result of Condition 30 of the SBC/Ameritech merger and was modified by the Commission in docket 01-0120, (the "Condition 30 Plan") is inconsistent with the structure set forth in Section 13-712 of the Act. Ameritech contends that the Rule attempts to improperly “resurrect” expired standards from that Plan that are not justified for wholesale services, as the pre-existing Plan, expired on October 8, 2002, pursuant to the terms of the SBC/Ameritech merger order. (Ameritech Initial Brief at 10; Reply Brief at 1-2).

The Wholesale Service Quality Plan that resulted from Condition 30 required Ameritech to make payments, as opposed to credits on a carrier’s account, for substandard service. Ameritech argues that requiring it to make these payments without notice and an opportunity to be heard violates its right to due process. Ameritech reasons that Section 13-712(e) authorizes the Commission to establish automatic remedies in the form of credits against the related services, and, according to Ameritech, this statute distinguishes those credits from penalties assessed under Section 13-305. (Ameritech Initial Brief at 10-11). Citing Section 13-304(a) of the Act, Ameritech contends that “additional assessments—in particular penalties” require case-specific proceedings with the protections of notice and an opportunity to be heard. Ameritech also cites Section 13-515(j) and maintains that the statute allows the Commission to impose sanctions upon a party that has improperly brought a complaint pursuant to that Section only “after notice and a reasonable opportunity to respond.” Ameritech additionally cites Section 13-516(c), which provides for “enforcement remedies” and allows the Commission to impose remedies or award damages and directs the Commission to establish, by rule, procedures for the imposition of remedies.

Ameritech further contends that being required to abide by the Condition 30 Plan is inconsistent with Section 13-712(g), as the statute calls for the Commission to establish remedies to ensure enforcement of its carrier to carrier wholesale service quality rules, and the Condition 30 Plan requires payments to the State of Illinois in some instances. Ameritech opines that payments to the State do not remedy any harm suffered by a wholesale customer, as they are merely penalties, assessed without notice or a hearing, in violation of Section 13-304 of the Act.

Ameritech argues that the Rule improperly distinguishes among carriers when requiring ILECs to use their pre-existing Plans, as Section 712(g), and the remaining portions of Section 712, do not distinguish among carriers. Such a classification, it reasons, is disparate treatment, as carriers other than Level 1 carriers are not required to have Wholesale Service Quality Plans. (Ameritech Reply Brief at 5).

Ameritech proposes a procedure by which a Level 1 carrier can agree to implement a Wholesale Service Quality Plan that meets or exceeds the measurements, standards or remedies provided by the Rule. Such a carrier can petition the Commission for a waiver of the application of part of, or all of, the Rule during the period of time that the alternative plan is in effect. (Ameritech Initial Brief, Appendix, Sec. 430).

The Position of Staff

Staff argues that Ameritech has confused the issue by failing to explain how the Rule actually uses and relies upon a preexisting Plan, and then further obfuscates this issue by misstating its position. Staff avers that the Rule recognizes that there are carriers with preexisting Plans, those Plans can come into play as a starting point, but the Rule, in fact, does not extend the term of the Condition 30/01-0120 Wholesale Service Quality Plan. (Staff Reply Brief at 4-6).

Staff also contends that the General Assembly bestowed a broad grant of authority on the Commission to promulgate rules as it sees fit, as Section 712(g), the enabling statute, provides:

> The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.

(220 ILCS 5/13-712(g)). Staff notes that the statute gave the Commission no specific direction, other than to establish and implement carrier to carrier wholesale service quality rules and establish remedies. Thus, Staff reasons, the General Assembly did not limit the Commission's ability, when promulgating the Rule, to consider particular services, company size, level of competition, and other related factors. Thus, Staff reasons, it does not follow from the language of Section 13-712(g) that all carriers must be treated exactly the same.

Staff avers that Ameritech's reliance on the retail service quality provisions and requirements of Section 13-712 to support a "one size fits all" approach for wholesale service quality rules is misplaced, as Paragraphs (c) through (f) of Section 13-712 set forth service quality requirements for retail service. Staff also cites the legislative history of Section 13-712(g), which provides:

> it is not the intent of the General Assembly for the service quality standards found in Section 13-712 of house Bill 2900 to preempt or supercede the service quality standards already imposed . . . It is the intent of the General Assembly for the service quality standards found in Section 13-712 to supplement or add to those service quality standards . .

(Remarks of Rep. Hamos, 92nd General Assembly, House of Representatives, 69th Legislative Day, May 31, 2001, at 34-35). Staff contends that, when enacting Section 712(g), the General Assembly intended to facilitate and nurture the competitive telecommunications environment and protect purchasers of wholesale services. Staff avers that the Rule, as written, reflects the General Assembly's concern that telecommunications carriers must be able to purchase wholesale services at an acceptable quality level. Staff also argues that economic or business classifications made by the government must be evaluated with deference; classifications of business must be sustained, if there is any conceivable basis on which to do so. In support, Staff cites Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981)).

Staff contends that Ameritech's position that this Commission should adopt one set of performance rules to apply, without variation, to all carriers is illogical and unreasonable, as it fails to recognize the differences among carriers, both in terms of their systems and in terms of their impact on, and importance to, developing and maintaining a competitive local telecommunications market. Staff points out that Ameritech currently controls approximately 80 percent of the access lines in Illinois. Also, Ameritech accounts for virtually all of the wholesale services provisioned in Illinois and it has developed extensive systems, both electronic and manual, to provision wholesale services and monitor its performance in provisioning such services. (*See,* Staff Ex. 7.0 at 12).

Staff posits that the development of "Levels, or "tiers," attempts to balance the needs of the large ILECs on the one hand, with the needs of smaller ILECs and the CLECs on the other. Staff cites evidence presented at the hearing that the multi-level approach was designed to address administrative ease, logical designation, and consideration of purchasing carrier requests.

Staff maintains that for those carriers that do not provide much in the way of wholesale services, the benefit of maintaining and reporting detailed and sophisticated performance measures and disaggregations, which are characteristic of the Level 1 Plans, could be outweighed by the cost of maintaining and reporting such data. For larger carriers with significant wholesale activity, on the other hand, the benefit of maintaining and reporting detailed and sophisticated performance measures and disaggregations can outweigh the related costs. Additionally, the carriers have vast differences regarding automated versus manual OSS systems, as well as different procedures and methods for provisioning wholesale services. Staff concludes that the demand for and provisioning of wholesale services in the service territories of smaller carriers is nowhere near the level in Ameritech's territory, and the systems used to provision those wholesale services are often manual and far less sophisticated than Ameritech's systems. (Staff Ex. 7.0 at 5-6).

The Position of Allegiance

Allegiance argues that the Commission has promulgated rules on numerous occasions that categorize utilities by size or other distinguishing characteristic. Allegiance reasons that therefore, it is an established practice at the Commission to divide utilities or carriers into categories and implement different requirements for each category. Pursuant to the rules of statutory construction, it maintains, the General Assembly must be presumed to know that such categorization could take place, as it must be presumed that the General Assembly was aware of other Commission regulations that created classifications. (Allegiance Reply Brief at 11-12).

The Position of AT&T

AT&T points to other parts of the 2001 Amendments (H.B. 2900, of which, Section 712(g) was a part). AT&T contends that those amendments, specifically, Sections 13-202.5 and 13-801, effectively "single out" ILECs. Thus, AT&T reasons that the Act recognizes the obvious policy reasons for treating smaller ILECs differently from large ILECs. AT&T also concludes that, if the Commission were to treat large ILECs like Ameritech in the same manner as the CLECs, the ILECs would have no incentive to improve their service quality. AT&T further contends that Section 712(g) does not mention hearings, and, according to AT&T, the whole purpose of having a Wholesale Service Quality Plan is to avoid having a hearing each time an ILEC fails to provide adequate service to a CLEC. (AT&T Reply Brief at 2-4, 8).

AT&T further objects to Ameritech's proposal to use "voluntary plans." AT&T argues that Ameritech's proposal has no process for determining how voluntary plans should be used; it does not provide for what kind of factual material should be submitted and it lacks any kind of process for notifying interested parties that an ILEC is seeking adoption of a voluntary plan. (AT&T Reply Brief at 9-10).

The Position of WorldCom

WorldCom avers that often, Commission rules differentiate between carriers, based on various criteria. Also, TA96 (47 U.S.C. Sec. 251 *et seq.)* differentiates between the carriers based on whether they are ILECS or CLECs. WorldCom posits that there is no language in Section 13-712(g) that suggests or requires the kind of "one size fits all" approach suggested by Ameritech. (WorldCom Reply Brief at 21).

WorldCom also seeks to modify the definition of the term "Preexisting Plan" in Section 105 of the Rule. WorldCom maintains that the current definition could be interpreted to include the perfunctory Commission approval of negotiated or arbitrated agreements that is required pursuant to TA96. WorldCom reasons that "approval" pursuant to TA96 should not be deemed to be "Commission approval" within the meaning of the Rule. WorldCom suggests that the definition in Section 105 of "preexisting plan" should be amended as follows:

"Preexisting Plan" means:

a) A plan implemented by or for a Carrier prior to the effective date of this rule (but not necessarily effective on such date) that contains one or more of the components required for a Wholesale Service Quality Plan as set forth in Section 731.300 (now Section 731.305) ("Pre-Rule Plan"), the terms and provisions of which have been specifically reviewed and approved by the Commission within the previous three (3) years, in a docketed proceeding <u>other than a proceeding that reviewed a negotiated or arbitrated agreement pursuant to Section 252 of the</u>

Telecommunications Act of 1996, (the scope of which was limited to review and approval of a Pre-Rule Plan); or

b) If the terms and conditions of a Pre-Rule Plan have not been specifically reviewed and approved by the Commission within the previous three (3) years in a docketed proceeding, other than a proceeding that reviewed a negotiated or arbitrated agreement pursuant to Section 252 of the Telecommunications Act of 1996, (the scope of which was limited to review and approval of a Pre-Rule Plan) for such Carrier, then the most recent Pre-Rule Plan implemented by such Carrier pursuant to a Commission order or, if no Pre-Rule Plan was implemented by such Carrier pursuant to a Commission order, the most recent Pre-Rule Plan implemented by such Carrier on a voluntary basis.

(WorldCom Reply Brief at 11-12; 47 U.S.C. Sec. 252(e)).

Commission Analysis and Conclusions

The Preexisting Plans

Ameritech argues that it should not be subject to “penalties,” contained in its Condition 30 Wholesale Service Quality Plan, without notice and an opportunity to be heard. It cites many provisions of the Act, none of which, concern wholesale service. As Staff points out, the provisions in Section 712 cited by Ameritech concern retail service, which has nothing to do with the issues here. (220 ILCS 5/13-712).

Also, notice and an opportunity to be heard are required before some sort of deprivation of a right can occur, such as deprivation of a property right, or prior to threatening a privacy interest. (*See, e.g., Pavlakos v. Department of Labor,* 111 Ill. 2d 257, 264, 489 N.E.2d 1325 (1985); *Lopez v. Fitzgerald,* 76 Ill. 2d 107, 122, 390 N.E.2d 835 (1979)). Ameritech makes no attempt to explain what right it has that would be affected by the imposition of “penalties.” Nor is it obvious, since, without the Condition 30 Plan, Ameritech would still be required to provide monetary compensation to CLECs in the form of credits. It is notable that, although notice and an opportunity to be heard are well-established constitutional requirements, Ameritech does not cite one case embodying these constitutional concepts.

Also, there is nothing in the Rule requiring Ameritech to “resurrect” the Plan that issued as a result of Condition 30 to the SBC/Ameritech merger, as modified by the Commission in docket 01-0120. Rather, the Rule merely requires Ameritech to have a Commission-approved Plan. Pursuant to the terms of the Rule, Ameritech is free to submit for Commission approval whatever Plan it sees fit. Therefore, we see no need for Ameritech’s proposed “voluntary plan.”

However, the Rule requires submission of a Plan, with supporting tariff, on or before April 1, 2004, and use of a Level 1 carrier’s pre-exisiting Plan between the effective date of the Rule and April 1, 2004. Section 205(a) will be amended to provide that:

> On or before April 1, 2004, and every two years thereafter, every Level 1 carrier shall file with the Commission for review and approval a tariff containing its Wholesale Service Quality Plan as specified in, and pursuant to, Subparts B, C, D and E of this Part. For any filing due after April 1, 2004, if a Level 1 carrier proposes to maintain, without any additions, deletions or modifications, its existing tariff containing its Wholesale Service Quality Plan, the Level 1 carrier may file, in lieu of filing a new tariff, a verified statement confirming that it will maintain in effect, without any additions, deletions or modifications, its existing tariff until modified pursuant to this Part.

Section 230(b) shall likewise be amended to provide:

> For a carrier with a Preexisting Plan, its Preexisting Plan shall be its effective Wholesale Service Quality Plan from the effective date of this rule through the effective date of its tariff due to be filed on or before April 1, 2004, under Section 731.200. The provisions of this paragraph shall apply notwithstanding any provision, term or condition of the Preexisting Plan, or any related Commission order, providing for the termination or expiration of such plan due to or based on the passage of time.

In this way, Ameritech is free to submit its Wholesale Service Quality Plan for Commission review when it sees fit, as long as it is not later than April 1, 2004. Thus, the Rule can no longer be said to impose any pre-existing Wholesale Service Quality Plan on a Level 1 carrier until such time as it makes its initial April 1, 2004 filing.

We note that, as WorldCom points out, the Rule could be construed to equate "Commission approval" of a Wholesale Service Quality Plan with the limited approval that is required of negotiated or arbitrated agreements pursuant to TA96. Statutorily, such review is limited to consideration of the following (i) whether the agreement discriminates against a telecommunications carrier that is not a party to the agreement; or (ii) whether implementation of the agreement or a portion of the agreement is not consistent with the public interest, convenience and necessity; or (iii) arbitrated agreements must meet the requisites of Section 251 of the Act. (47 U.S.C. Sec. 252(e)). Such approval cannot be equated with Commission review of the merits of a Wholesale Service Quality Plan. WorldCom's proposed language, excluding the limited approval pursuant to TA96, will be incorporated into Section 105 of the Rule. (Appendix, Sec. 105).

With regard to Ameritech's suggested waiver provision, the Rule already provides for a waiver of filing requirements for Level 1 carriers; we see no need to expand the Rule I this regard. Furthermore, Ameritech's waiver provision, as written, could be used to circumvent Level 1 requirements.

Tiers

Ameritech's vague reference to disparate treatment, a well-established constitutional theory, without citing any legal basis in support, lacks merit. The equal protection clauses of the Illinois and United States Constitutions remedy invidious discrimination. Those clauses requires the government to treat similarly situated individuals in the same manner. (*Segers v. the Industrial Comm.,* 191 IIll.2d 421, 435, 732 N.E.2d 488 (2000)). The level of scrutiny applied in reviewing a law creating the classification pursuant to the equal protection clause depends on the nature of the classification; those classifications based on a suspect class, such as race, or affecting a fundamental right, receive a heightened level of review, or, strict scrutiny. Ameritech does not mention a fundamental right; nor is it in a suspect class. Classifications of businesses that do not involve fundamental rights are reviewed under the rational basis test. (*Id.*). Therefore, the classification must be upheld, if any set of facts that can reasonably be conceived justifies the imposition of the classification. (*Stroger v. R.T.A.,* 201 Ill.2d 508, 522, 778 N.E.2d 683 (2002)).

We find no violation of the equal protection clauses of the United States and Illinois Constitutions, and we find Staff's approach, in imposing different requirements on different carriers, to be a factually reasonable basis for the Rule. The record is replete with evidence that the needs of, and support systems of, different carriers is drastically different. Also, the record established that currently, Ameritech provides most of the wholesale service, while Level 2 carriers and Level 4 carriers provide very little wholesale service, if any. If we were not to recognize those differences, we would be ignoring that evidence. Moreover, as a practical matter, we are obligated to acknowledge the existence of Wholesale Service Quality Plans, as, otherwise, the Rule could result in duplication.

We further concur with Staff that the broad grant of authority in Section 712(g), the enabling statute, allows reasonable categorization of carriers. Any other reading of this statute would diminish the General Assembly's articulated concern in Section 712(a) which is:

> It is the intent of the General Assembly that every telecommunications carrier meet minimum service quality standards . . . on a non-discriminatory basis to all classes of customers.

Thus, the General Assembly's concerns was with establishing minimum service quality standards and Section 712(g) gave the Commission a wide grant of authority to do whatever is necessary to establish minimum service quality standards, including categorizing carriers based on their size and level of complexity of their equipment. As Allegiance points out, we are required by the rules of statutory construction to presume that, when enacting Section 712(g), the General Assembly was aware that the Commission often created classifications between carriers, based on size and like criteria. (*See, e.g, Jacobson v. General Finance,* 227 Ill. App. 3d 1089, 1098, 592 N.E.2d 1121 (2^{nd} Dist. 1992)). Therefore, the General Assembly must be presumed to know that the Rule promulgated could classify carriers and it nevertheless gave the Commission wide, unrestricted authority. We conclude that the Rule's Levels, or Tiers, do not exceed the scope of Section 712(g), the enabling statute. Nor does it violate any other provision in Section 712.

b) Ameritech's Proposal to Delete Sections 220(b)(3)

Ameritech's Position

Section 220 requires that certain documentation must be provided by the Level 1 carriers in support of their biennial filings that support Wholesale Service Quality Plans. Ameritech seeks to delete Subsection 220(b)(3), which requires Level 1 carriers to file evidence with the Commission supporting their Wholesale Service Quality Plans establishing the extent to which that Plan has successfully facilitated a competitive telecommunications market. Ameritech maintains that this provision unreasonably forces Level 1 carriers to speculate about CLEC business decisions and the impact of a Wholesale Service Quality Plan on the market. (Ameritech Initial Brief at 31).

Staff's Position

Staff maintains that Section 220(b)(3) is simply an informational requirement that seeks a Level 1 carrier's assessment of its Wholesale Service Quality Plan on the competitive market. (Staff Reply Brief at 20).

Commission Analysis and Conclusions

We agree with Ameritech that Level 1 carriers should not be forced to make a determination as to whether or how their Wholesale Service Quality Plans facilitate competition in the marketplace, as such evidence could only be speculative, at best. While Staff contends that this requirement is an informational one, Staff acknowledges that it requires an ILEC to make an assessment. It is not, therefore, a simple request for information and it appears that the assessment it requires an ILEC to make would be of little evidentiary value. Section 220(b)(3) will be deleted, in its entirety, and Sections 220(b)(4) through (8) shall be renumbered. (Appendix, Sec. 220(b)).

c) Ameritech's Proposal to Amend the Reporting Requirements in Sections 320 and 410 (Renumbered as 325(a) and 410)

The Position of Ameritech

Ameritech contends that the reporting requirements for Level 1 carriers in Sections 325 and 410 should be clarified to ensure that the information reported does not include competitive information about wholesale services or about other competitors, and is limited to data concerning the purchasing carrier's own transactions and remedies. (Ameritech Initial Brief at 31).

The Position of Staff

Staff finds Ameritech's concerns to be reasonable with regard to Section 325, and it has proposed the following modification:

> Each carrier's Wholesale Service Quality Plan shall provide that the Level 1 carrier will report monthly data to the Commission and to <u>each</u> carrier purchasing Wholesale Services. At a minimum, the monthly data shall include the total number of transactions on a per measure basis, the number of instances in which standards contained in the Level 1 carrier's Wholesale Service Quality Plan were not met on a per measure basis, and calculations supporting any remedies <u>paid pursuant to the Wholesale Service Quality Plan. Although aggregate data must be made available to the Commission and all carriers purchasing Wholesale Services, carrier specific data should only be made available to the Commission and carriers for their own (i.e., the purchasing carrier's) business transactions</u>.

Staff states that it does not agree that a change to Section 410 is required. (Staff Reply Brief at 21).

Commission Analysis and Conclusions

It appears that Staff's revision to Section 325 addresses Ameritech's concerns. Staff's changes to this portion of the Rule are adopted. (Appendix, Sec. 325).

With regard to Section 410, that Section does not mention competitive information about wholesale services or about other competitors. At most, it only requires that aggregate data (total amounts) must be made available to Commission Staff and purchasing carriers. (*See,* Appendix, Sec. 410(b)). Aggregate data is not specific enough to reveal competitive information. We therefore decline to amend Section 410.

d) Sections 300(g) and 325 (Renumbered as 305(g) and 330): Audits of Level 1 Carriers

Background

The Rule requires Level 1 carriers to provide, in their Wholesale Service Quality Plans, for periodic audits of the wholesale performance data conducted by an independent auditor. (*See,* Appendix, Sec. 330). Such audits must be scheduled at regular intervals; these audits required in order to ensure that the data reported is valid, reliable and in accordance with the published business rules. (*Id.* at Sec. 305(g)). The Rule also requires such Plans to provide for audits initiated by requesting carriers. (Appendix, Sec. 330).

Verizon's Position

Verizon views Section 330 as unnecessary because, according to Verizon, the information audited is easily calculated and verified by the affected CLEC. Verizon concludes that a more reasonable alternative is for the Commission to adopt an audit provision whereby audits are only performed, if requested by a purchasing carrier. (Verizon Initial Brief at 27). Because Verizon's proposal would require the purchasing carrier to pay for the audit if the concern is not substantiated by the audit, Verizon concludes that its approach discourages frivolous audit requests. (Verizon Initial Brief at 26-28).

Currently, Verizon is required to submit audits to the FCC. In the alternative, Verizon proposes that, if the Commission deems regular audits to be necessary, the results of FCC plan audits to satisfy that requirement. Verizon notes that the same measures, standards and incentive calculations are involved, and therefore the audit of the FCC plan would cover the same systems, data collection and incentive calculation methods. (*Id.* at 28).

Ameritech's Position

Ameritech has proposed additional language for Section 325 to clarify that a carrier requesting an audit should pay the costs of an audit, unless the basis for requesting the audit is found to be warranted, and then, the costs would shift to the audited carrier. Ameritech reasons that if a requesting carrier did not at least potentially bear some responsibility for the cost of the audit, that carrier would have no incentive to limit its audit requests to those that are truly warranted. (Ameritech Initial Brief at 31-32).

The Position of Staff

Staff contends that the issues set forth by Ameritech and Verizon are best addressed in their Wholesale Service Quality Plans. (Staff Reply Brief at 21).

Commission Analysis and Conclusions

We disagree with Verizon that the information audited is easily calculated and verified by the affected CLEC. Audits concern more than the amounts paid, they verify the bases for the amounts paid. (*See,* Appendix, Secs. 305(g) and 330).

However, Verizon's point, essentially, that it already is required to submit audits to the FCC, is well-taken. There is no evidence indicating that the results of this same audit would be less credible, or, that they would be in different measures, and therefore less understandable. We also note that audits can be time-consuming and expensive. There is nothing in the Rules that would prevent Verizon from submitting the same audit to the Commission that it submits to the FCC. The only limitation in those provisions is that the audit must be conducted by an independent auditor. Therefore, we deem any change to the Rule to regarding regularly-scheduled audits to be unnecessary.

Regarding audits initiated by requesting carriers, as Staff points out, Verizon and Ameritech are free to specify who pays for such audit in their Wholesale Service Quality Plans. (*Appendix,* Sec. 330). Therefore, the changes proposed by Verizon and Ameritech are unnecessary.

e) Sections 200, 210 (Renumbered as Section 205 and 210): Tariffing of Level 1 Plans

Background

The Rules require Level 1 carriers to submit a Wholesale Service Quality Plan and a tariff containing its Wholesale Service Quality Plan for Commission approval every two years, or, upon on a change in the Plan. Such a filing must include supporting documentation. (Appendix, Secs. 220(a) and (b)). However, Level 1 carriers may seek, and obtain, waivers of parts of the supporting documentation requirement, if good cause is shown. (*Id.* at Sec. 200(c)).

Staff's Position

Staff proposes that the Rule must require Level 1 carriers to tariff their Wholesale Service Quality Plan. (*See* Appendix, Secs. 200, 210). In support, Staff cites Section 13-501(a) of the Act, which provides, in relevant part, as follows: "No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rules, and other charges, terms and conditions of service . . ." (220 ILCS 5/13-501(a)). Staff reasons that a Wholesale Service Quality Plan fits within the statutory definition of "telecommunications service," which is "[t]the provision or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of information. . . and includes access and interconnection arrangements and services." (220 ILCS 5/13-203).

Staff maintains that what is contained in a Wholesale Service Quality Plan is "access and interconnection arrangements and services." Staff further cites the Act's definition of the term "rate," which includes "every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility . . . or any schedule or tariff thereof, and any rule, regulation, charge, practice or contract relating thereto."' (220 ILCS 5/3-116). It argues that a Wholesale Service Quality Plan fits within this definition. Staff concludes that the Act requires tariffing of the services provided in a Wholesale Service Quality Plan.

Staff opines that tariffs do more than govern the rates and charges a carrier may assess to their customers for services provided; tariffs must also contain rules, regulations, storage or other charges, privileges and terms and conditions relating to the provisioning of services. Staff additionally cites Section 9-104 of the Act, which requires tariffing of any service, product or commodity to include the relevant rates and other charges and classifications, rules and regulations. Staff further avers that the specific components of the physical provisioning of telecommunications services, and the quality of that services, which are contained in a Wholesale Service Quality Plan, are the manners in which and level at which a given service must be provided, which are routinely the subject-matter of tariffs. (Staff Reply Brief at 26).

Staff opines that Wholesale Service Quality Plans should be tariffed for policy reasons, as tariffs are a public document that are generally available to consumers, as well as all other carriers. Staff concludes that having the Wholesale Service Quality Plans tariffed assures that changes cannot be made to the Plans without Commission oversight, thereby allowing comments and input from connecting carriers. (Staff Exhibit 3.0 at 6)

Staff is of the opinion that if Wholesale Service Quality Plans were to be provided to the Manager of the Telecommunications Division, as Verizon suggests, there would be no means, by which, interested parties could comment on proposed changes. Staff is of the opinion that Verizon's alternative provision does not have a procedure in place for notifying interested parties when a document is submitted at Staff level.

Staff strongly disagrees with Verizon's contention that tariffing a Plan renders it less flexible. Staff posits that tariffs can be, and are, changed at will, subject to the Commission's authority to suspend and investigate a tariff. There is no limitation to the amount or scope of changes that can be made to any tariff. Any changes in the marketplace, Staff concludes, can be addressed easily in the tariffs.

Also, according to Staff, other carriers may want to “buy services out of the tariffs” rather than through an interconnection agreement. Additionally, Staff maintains that, without tariffing, a Wholesale Service Quality Plan would be subject to revision with each negotiation, which could lead to discriminatory treatment. Staff concludes that although it may be appropriate to incorporate Wholesale Service Quality Plans into interconnection agreements, such action would not satisfy the state law requirement to tariff such a plan.

The Position of Allegiance

Allegiance contends that a Wholesale Service Quality Plan contains “terms and conditions of the service to be provided” within the meaning of Section 501(a) of the Act, which sets forth the general requisites for tariffing of telecommunications services. (220 ILCS 5/13-501(a)). Allegiance further argues that Verizon has not presented any evidence substantiating its claim that tariffing would be burdensome to it. Allegiance finds it implausible that tariffing Wholesale Service Quality Plans would be burdensome, as carriers file and maintain tariffs all the time. Allegiance points out that Ameritech tariffs its Wholesale Service Quality Plan. Allegiance acknowledges that there may be alternatives to tariffing. However, it finds Verizon’s proposal to be unacceptable, as, according to Allegiance Verizon’s proposal does not have established, predictable procedures for periodic review. (Allegiance Reply Brief at 17-8).

The Position of Verizon

Verizon argues that there is no legal requirement for Level 1 carriers to tariff their Wholesale Service Quality Plans because such Plans are not a “telecommunications service” within the meaning of 220 ILCS 5/13-203. It avers that a Wholesale Service Quality Plan is not a telecommunications services; instead, it is a set of standards and a self-executing mechanism for calculating incentive payments when standards are not met. Verizon also avers that a Wholesale Service Quality Plan is not offered in exchange for value, within the meaning found in Section 13-203, which defines “telecommunications services.” (Verizon Initial Brief at 15).

Staff’s argument is fatally flawed, Verizon posits, because a Wholesale Service Quality Plan does not contain a “rate.” Verizon points to part of Section 3-116 of the Act, which defines a “rate” as a charge that is compensation of a public utility. According to Verizon, a Wholesale Service Quality Plan cannot be considered to be a charge that compensates a public utility and it does not include a schedule of charges or other rules that would affect the amount a carrier charges a customer for a given service. (Verizon Initial Brief at 16).

Verizon contends that a Rule requiring the tariffing of Level 1 Wholesale Service Quality Plans will result in significant and unjustified burdens on Level 1 carriers, as, according to Verizon, tariffs are not easily amended, and, tariffs can result in a proceeding that lasts approximately 11 months. It points out that its current Plan provides for automatic updates to incorporate revisions. (Verizon Ex. 1.0 at 4-6; Verizon Initial Brief at 16-17).

Verizon has offered alternative language to replace Staff's proposed Section 200. This alternative language would allow Level 1 carriers to submit their Wholesale Service Quality Plans to the Commission's Manager of the Telecommunications Division, rather than filing a tariff, every two years, or whenever an amendment is made to the plan. Verizon's proposal also requires Level 1 carriers to notify all certificated carriers in Illinois of any such submissions. Further, the proposal has a process, by which, the Commission may investigate a Level 1 carrier's Plan, if conditions warrant. Verizon posits that it does not matter that a submission to the Manager of the Telecommunications Division is not an official filing, as, if a Level 1 carrier did not make such a submission, the Commission could use its enforcement powers relating to a violation of a Commission Rule, order or mandate, or, it could use the language it provided for the Commission to initiate a proceeding to investigate, modify, update or amend a Wholesale Service Quality Plan. (Verizon Initial Brief at 21-22).

Additionally, the Company notes that its current Wholesale Service Quality Plan was originally submitted to Staff and no party has alleged that it is not available to the Commission and interested parties. (*Id.* at 20). According to Verizon, its alternative proposal actually informs interested parties in a manner that is superior to tariffing, as its proposal requires posting of a plan on a carrier's website, instead of the current system, which requires a carrier to follow the Commission's daily filings to discover an update to a Level 1 Plan. Verizon concludes that the posting of a plan on a carrier's website is a better method of making a Plan available to consumers and carriers. (*Id.* at 21-22).

The Position of Ameritech

Ameritech argues in its Reply Brief that requiring Wholesale Service Quality Plans to be tariffed contravenes TA96, specifically 27 U.S.C. Sec. 252(a)(1). Ameritech cites *Wisconsin Bell v. Wisconsin Public Service Comm.* (Sept. 27, 2002, No. 01-C-0690), in which, the U.S. District Court for the Western District of Wisconsin ruled that, when requiring Wisconsin Bell to offer network elements in certain combinations pursuant to tariffs, the Wisconsin Public Service Commission (the "WPSC") "imposed a requirement that circumvents the interconnection agreement process prescribed under Sec. 252." (*See,* Ameritech Reply Brief at 15-16, Appendix to Reply Brief, at 14). That court reasoned, even though a buyer was not required to "buy out of the tariff," that, because the incumbent had no choice in the matter, the WPSC's imposition of a tariff on circumvented the requirement in 47 U.S.C. Sec. 251(b)(1) that the incumbent and requesting carrier negotiate binding agreements. (*See,* Ameritech Reply Brief, Appendix, p. 10).

Ameritech also cites *Verizon North, Inc., v. Coast to Coast Telecommunications,* (Oct. 3 2002, No. 00-CV-71442) in which, the U.S. District Court for the Eastern District of Michigan ruled that, when requiring Verizon to adhere to a tariff, in the absence of an interconnection agreement, the Michigan Public Service Commission improperly circumvented Section 252 of TA 96, 47 U.S.C. Sec. 252. (*See,* Ameritech Reply Brief, Appendix, at 9-11).

AT&T's Position

AT&T posits that tariffing Wholesale Service Quality Plans will provide an excellent reference point to any new CLEC and it allows the Commission to carefully monitor the Plans. (AT&T Reply Brief at 11).

Commission Analysis and Conclusions

Ameritech's Arguments

The federal cases cited by Ameritech make it clear that tariffing cannot be used to replace negotiated interconnection agreements. The reasonableness of this Congressional mandate becomes evident when it is viewed in its factual context. A negotiated agreement is a contract, that is negotiated, like any other contract. The negotiation process allows parties to debate their special needs in the negotiation process and it allows those parties to enunciate their needs and concerns through a legally binding obligation—the contract. Thus, when a tariff supplants a negotiated agreement, the use of the tariff has been held to violate 47 U.S.C. Sec. 252(i) and other pertinent portions of TA96. [1] Here, however, a tariff allows, but does not require, a CLEC to "buy out of the tariff" without entering into an interconnection agreement. Such a process does not violate TA96. (*See, e.g, U.S. West v. Sprint Communications,* 275 F.3d 1241, 1250-52 (10th Cir. 2002)). Thus, Ameritech's arguments are meritless.

Verizon's Arguments

Verizon's question, essentially, is whether a Wholesale Service Quality Plan, which governs what occurs when telecommunications service is substandard, is something that is "provisioned or offered for rent, sale or lease or in exchange for other value received" of transmittal information, facilities used to providing such transmission, including "access and interconnection arrangements and services." (*See*, 220 ILCS 5/13-203). If a Wholesale Service Quality Plan falls within this definition, then, the Level 1 carriers are required to file tariffs describing the "applicable rates and other charges, terms and conditions of services . . ." (220 ILCS 5/13-501(a)).

Verizon focuses on the fact that the service provided is not offered in exchange for value; essentially, remedies paid by ILECs are in substitution for the previously bargained for services, if and when those services are not provided. However, Section

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[1] 47 U.S.C Sec. 252(i) provides, in pertinent part, that a LEC must make available "[a]ny interconnection, service, or network element provides under an agreement . . . to which it is a party to any other requesting telecommunications carrier upon those same terms and conditions as those provided in the agreement."

13-203 expressly includes "access and interconnection arrangements and services." (220 ILCS 5/13-203). Thus, Section 13-203 includes many items that are tangential to, but a necessary part of, the telecommunications services or commodities. Those arrangements and services include the details, the "fine print" of the financial and other arrangements for the provision of telecommunications services.

Section 3-116 of the Act further defines a "rate" as a compensation of any public utility "or any schedule or tariff thereof, and any rule, regulation, charge, practice or contract relating thereto." (220 ILCS 5/13-116). The term "rate," too, encompasses financial and other details that are a necessary part of providing services. (*See, e.g., Moenning v. Illinois Bell Telephone Co.,* 139 Ill. App. 3d 521, 525-26, 487 N.E.2d 980 (1st Dist. 1985), ruling that a rate includes rules regarding credit, including the requisites regarding security deposits; *Abbot Laboratories v. I.C.C.,* 289 Ill. App. 3d 705, 711-13, 682 N.E.2d 340 (1st Dist. 1997), ruling that the statutory definition of the term "rate" includes an unauthorized use charge; *Illinois Bell Telephone Co. v. I.C.C.,* 203 Ill. App. 3d 424, 437, 561 N.E.2d 426, (1st Dist 1990), ruling that rules governing refunds are "rates.")

We conclude that the terms in a Wholesale Service Quality Plan concerns when a service must be provided, how it must be provided, and other terms, such as financial arrangements, which are "access and interconnection arrangements and services" within the meaning of the statutory definition of "telecommunications services" in Section 13-203 of the Act. The previously-cited cases make it clear that the fine print regarding what sum of money a customer ultimately owes, or is owed, by a carrier, as are part of the "interconnection arrangements" within the meaning of Section 13-203, Those terms are also part of any "rule, regulation, charge, practice or contract" and are part of the "rates" imposed, within the statutory definition of "rate" found in Section 3-116. Therefore, Wholesale Service Quality Plans must be tariffed. Because we conclude that Illinois law requires tariffing of Wholesale Service Quality Plans, we need not discuss Verizon's proposed alternative to tariffing.

f) Waivers for Level 1 Carriers

The Position of Verizon

Verizon desires to include in the Rule a provision that allows a Level 1 carrier to apply for, and receive, a waiver of any Section of the Rules that is applicable to a Level 1 carrier. Verizon contends that such a mechanism is a useful tool, in light of the fact that it is difficult to develop a rule that conforms to each carrier's unique situation. (Verizon Initial Brief at 11-12).

The Wireless Coalition's Position

The Wireless Coalition contends that the Commission should reject Verizon's proposal for a waiver of any particular section of the Rule. The Coalition opines that such waivers will only allow further delay in its ability to receive wholesale special access services that is not substandard. (Wireless Coalition Reply Brief at 12).

The Position of Allegiance

Allegiance finds Verizon's waiver provision to be unacceptable, as it does not provide for alternative means of filing, adjudicating the appropriateness of, and enforcing, the carriers' Wholesale Service Quality Plan, or any revisions to those Plans. (Allegiance Reply Brief at 19).

The Position of Staff

Staff contends that a waiver is unnecessary because Section 13-513 of the Act provides for a waiver of all of or of any part of any part of the Rule, if a carrier can demonstrate that the waiver would not harm consumers and would not impede the development or operation of a competitive market. Staff additionally argues that the Rule, all by itself, allows flexibility and individual treatment for the Level 1 carriers. Staff further avers that the proposal made by Verizon could lead to abuse. (Staff Reply Brief at 33-34).

Commission Analysis and Conclusions

We decline to adopt Verizon's waiver provision, which would allow any Level 1 carrier to be exempt from any requirement. Verizon did not establish a need for such a provision and none is apparent. Moreover, Verizon's provision, as proposed, could lead to abuse. Finally, as Staff points out, procedures already exist for waivers when they are truly needed.

g.) Wholesale Special Access Services

1.) Commission Jurisdiction over Wholesale Special Access Services

Background

Wholesale special access services, generally, are dedicated non-switched transmission paths that connect various points on a carrier's transmission path. (*See, e.g.,* Appendix, Sec. 105). The Rule requires Level 1 carriers to include wholesale special access services in their Wholesale Service Quality Plans. However, the wholesale special access services that are covered by the Rule are only intrastate. (*Id.*).

Ameritech's Position

Ameritech recognizes that the Rule only covers intrastate services. It argues that including intrastate special access services in the Rule does not make good policy sense, since, according to Ameritech, the majority of special access circuits are jurisdictionally interstate and thus, the majority of those services fall outside of the jurisdiction of this Commission and within the interstate jurisdiction of the FCC. Ameritech also claims that a Rule regarding intrastate special access services may conflict with the FCC's currently pending rulemaking regarding interstate special access services. (Ameritech Initial Brief at 15, 21 and 25).

The Position of Verizon

Verizon objects to including Wholesale Special Access Services in Part 731. Verizon argues that these services are primarily interstate services. (*See, e.g.*, Verizon Exhibit 1.0 at 11). Verizon argues that special access is currently subject to the FCC's Notice of Proposed Rulemaking addressing special access services and the Commission should defer the imposition of any wholesale special access standards because such imposition may cause a conflict with the FCC proceeding. (Verizon Initial Brief at 16).

In its Reply Brief, Verizon points out that while Staff contends that the definition of "wholesale services" in the Rule limits those services to telecommunications services that are subject to the Commission's jurisdiction, the Rule's current definition of "Wholesale Special Access" is not so limited. Verizon contends that the Rule should be clarified to avoid confusion. (Verizon Reply Brief at 28).

The Position of Staff

Staff points to the definition of "wholesale services," which includes only those services that are subject to the Commission's jurisdiction. (*See,* Sec. 105). Staff opines that it is highly unlikely that a conflict could arise between FCC regulation and the Rule, which concerns only intrastate services. Staff cites TA96, which provides:

> Additional State Requirements. Nothing in this part precludes a state from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the state's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

(47 U.S.C. Sec. 261). Staff concludes that TA96 expressly preserves the state authority to regulate intrastate services to further competition. Staff notes that the FCC is currently considering expanding the role that state commissions can play regarding interstate special access services, citing *In the Matte of Performance Measurement and Standards for Interstate Special Access Services,* CC Docket 01-339.

Staff disagrees with Ameritech's argument that the majority of the special access circuits are interstate in nature. Staff opines that there are enough intrastate special access circuits being ordered by carriers to warrant the imposition of standards, measurements and remedies for those companies that order these wholesale services. (Staff Exhibit 8.0 at 4-5).

The Position of the Wireless Coalition

The Coalition argues that most of the wholesale special access services it uses are intrastate and intra-LATA in nature. (*See, e.g.,* Wireless Exs. 1.0 at 3, 2.0 at 3, 5.0 at 5). Citing *In Re Performance Measurements and Standards for Interstate Special Access Services*, FCC Docket No. 01-321, FCC 01-339 at 7, the Coalition contends that because its members obtain wholesale special access services from Level 1 ILECS are intrastate and intraLATA, this Commission has jurisdiction over those services and the FCC has not preempted state regulation of these services. (*Id.* at 15).

The Position of Citizens

Citizens argues that the overwhelming majority of special access circuits are jurisdictionally interstate. Citizens concludes that therefore, the rates and other terms of such circuits are regulated by the FCC, not state commissions. (Citizens Reply Brief at 11-12).

The Position of WorldCom

WorldCom contends that the Commission has jurisdiction to regulate intrastate special access services. (WorldCom Reply Brief at 2-8).

Commission Analysis and Conclusions

The ILECs do not really contend that the Commission cannot regulate intrastate wholesale special access services. Rather, they generally dispute the purchasing carriers' contention that they use a considerable amount of interstate wholesale special access services. However, the purchasing carriers are in the best position to know the nature of their special access circuits and they contend that most of their circuits are intrastate.

We are not also persuaded by the ILEC arguments that regulation of these services might conflict with FCC rules regarding interstate services. The parties arguing this position have supplied no fact indicating that there is a real possibility of such a conflict. And, as Staff points out, TA96 specifically provided that state commissions can regulate such intrastate services.

However, Verizon makes a valid point that the definition of "Wholesale Special Access" should be modified, in order to avoid confusion. Therefore, Section 105 of the Rule is amended to read, in pertinent part: "'Wholesale Special Access" means an <u>intrastate</u> Wholesale Service . . . " (Appendix at 105).

2.) Whether Including Wholesale Special Access Service in this Docket Exceeds the Scope of the Enabling Statute

Staff's Position

Staff cites the enabling statute, which provides:

> The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.

(220 ILCLS 5/13-712(g)). Staff reasons that Section 13-712(g) gives the Commission very broad authority, without any specific direction as to what particular services the rules should govern. It argues that the General Assembly neither mandated nor limited the Commission's ability to consider particular services, company size, level of competition, business rules, benchmarks, parity, or any of the other many issues that must be considered in the development of wholesale service quality standards. According to Staff, the General Assembly did not limit the authority it vested in the Commission to implement rules that only govern basic local exchange service, which would exclude wholesale special access services. (Staff Initial Brief at 29-31; Reply at 14).

Staff refers to paragraphs (c) through (f) of Section 13-712, which set forth service quality requirements for retail service. In each of those provisions, the General Assembly specifically referred to the term "basic "basic local exchange service." (220 ILCS 5/13-712(c), (d), (e) and (f)). Staff maintains that this term is absent from Section 13-712(g). Staff reasons that, if the General Assembly intended to limit wholesale service quality rules to "basic local exchange service," it would have placed the words "for basic local exchange service" in Section 13-712(g). Staff also posits that restricting the wholesale measures to "basic local exchange service" would eliminate a range of services needed by many CLECs to foster and protect competition. (Staff Initial Brief at 29-31).

The Position of the Wireless Coalition

The Wireless Coalition acknowledges that it does not provide "basic local exchange services." Still, it contends that the wholesale special access services it uses must be regulated by the Rule. (Wireless Initial Brief at 14). It argues that two phrases in Section 712(g) are pertinent: "carrier to carrier," and "wholesale services." The Coalition points to the statutory definition of a "telecommunications carrier," which is:

> any corporation . . . that owns controls, operates or manages . . . for public use, any plant, equipment or property used . . . in connection with telecommunications service between points within this State which are specified by the user.

(220 ILCS 5/13-202). Because the members of the Wireless Coalition are certificated to provide, and they do provide, telecommunications services for public use in this state, the Coalition reasons that they are "carriers" within the meaning of Section 712(g). (Wireless Initial Brief at 8). The Wireless Coalition acknowledges that the Act does not include a definition of "wholesale services;" however, it directs the Commission to review the definition of "retail telecommunications services," which specifically excludes wholesale services:

> [a] telecommunications service sold to an end user. 'Retail telecommunications service' does not include a telecommunications service provided by a telecommunications carrier to a telecommunications carrier, including to itself, as a component of, or for the provision of, telecommunications services.

(220 ILCS 5/13-220). The Coalition contends, essentially, that the special access services in question fit within the statutory exclusion of wholesale services, which is the subject of this docket. The Coalition additionally argues that the General Assembly directed the Commission to establish rules and remedies governing any and all inter-carrier transactions involving wholesale telecommunications services, which the Coalition provides, under the exclusion of wholesale services found in Section 13-220. (Wireless Initial Brief at 8-9).

The Coalition argues that limiting the scope of this docket would violate established standards of statutory construction, as the enabling statute, Section 712(g), does not limit the rules to be promulgated to those regarding basic local exchange services. The Coalition further contends that the Commission cannot read a limitation into Section 712(g) when it is not there. (*Id.* at 13-14).

The Position of AT&T

AT&T maintains that wholesale special access services should be included in the Rule. It points to other portions of Section 712 and concludes that the grant of authority in Section 712(g) is much broader than what is required by other parts of Section 13-712. (AT&T Initial Brief at 6).

AT&T maintains that the ILECs' attempt to limit the Rule to "basic local exchange services" would "gut" the entire Rule, as the wholesale services provided from one carrier to another are not "basic local exchange services." Instead, according to AT&T, those services are a broad range of wholesale services that CLECs use to provide telecommunications services to its customers. Thus, AT&T reasons, Part 731 should govern the wholesale services provided by ILECs to CLECs, and not the resultant retail services the CLECs offer to end users. (AT&T Reply Brief at 13).

The Position of Verizon

Verizon posits that special access services are "access services," and, therefore, they is not basic local exchange services subject to regulation pursuant to Section 13-712(g). (*See,* Verizon Ex. 6.0 at 3; Initial Brief at 8). Verizon maintains that wholesale special access services should not be included in the Rule because, according to Verizon, such services are not within the scope of the enabling statute. Citing well-established principles of statutory construction, Verizon maintains that a regulation promulgated by an administrative agency cannot exceed the scope of the authority in the statute authorizing such promulgation.

Verizon also points to the order initiating this docket, which states, in pertinent part:

> . . .The Public Act added Section 13-712 to the Act. This Section deals with basic local exchange service quality. Subsection (g) states:
>
> The Commission shall establish and impellent carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.
>
> This mandate necessitates the initiation of a rulemaking proceeding to establish the required rules.

(Initiating Order, Docket No. 01-0539). Verizon concludes that the Commission defined the scope of this docket with this language to exclusively include "basic local exchange services." (Verizon Initial Brief at 5-8).

Verizon also looks to the caption of Section 13-712, which is entitled "Basic Local Exchange Service Quality; Customer Credits." (220 ILLCS 5/13-712). Verizon points to the legislative statement of intent, which is articulated in Section 13-712(a). It provides:

> It is the intent of the General Assembly that every telecommunication carrier meet minimum service quality standards in providing basic local exchange service on a non-discriminatory basis to all classes of customers.

(220 ILCS 5/13-712(a)). This language, Verizon concludes, limits the scope of the Rule to be promulgated in this proceeding to basic local exchange services.

The Position of Citizens

Citizens argues that wholesale special access services should not be included in the Rule. Citizens cites Verizon's argument in support of its contention that wholesale special access services are not basic local exchange services. (Citizens Reply Brief at 11).

The Position of Ameritech

Ameritech argues that special access services are not "basic local exchange services," and therefore, the Rule should not include advanced services. Ameritech contends that wholesale special access services "are provided to carriers primarily for long-distance and wireless services, neither of which qualifies as basic local exchange service." (Ameritech Initial Brief at 16).

The Position of WorldCom

WorldCom posits that a policy enunciated in the Act is to promote competition in Illinois. (WorldCom Reply Brief at 19). WorldCom contends that restricting measures to "basic local exchange services" would eliminate a range of services that is needed by many CLECs. WorldCom points out that there is nothing in Section 712(g) indicating that the General Assembly intended to limit or restrict the Commission's authority to establish rules regarding only "basic local exchange services. " (*Id.* at 19-20).

The Position of Allegiance

With regard to Verizon's contention that the Commission limited the scope of this docket in its initiating order, Allegiance concludes that limiting the Rule to cover "basic local exchange services" is a substantive issue, which the Commission would not, and could not, determine with finality in the initiating order before an evidentiary hearing on the subject. (Allegiance Reply Brief at 8). Allegiance points out that the initiating order is only an interim order, which can be revised, corrected or superceded by the Commission in a final order, after the parties have had notice and an opportunity to be heard on the subject.

Allegiance avers that Verizon and Ameritech are factually incorrect when they argue that wholesale special access services are not used to provision basic local exchange services, as special access services are used by purchasing carriers to service retail customers. Allegiance reasons that the scope of this docket includes services used on a wholesale basis by carriers to provide basic local exchange services, irrespective of whether those services, in and of themselves, are "basic local exchange services." Allegiance concludes that wholesale special access services, which are used by carriers to provide basic local exchange services, must be included in this docket. (*Id.* at 9).

Commission Analysis and Conclusions

The Legal Arguments

This Docket commenced implementing Section 13-712(g) of the Act, which provides, in its entirety, as follows:

> The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.

(220 ILCS 5/13-712(g)). The question posed by the parties' arguments above is what wholesale services should be included in Part 731, as the statute does not so specify.

When construing a statute, effect must be given to the intent of the legislature. (*Wal-Mart Stores, Inc., v. the Industrial Comm.,* 324 Ill. App. 3d 961, 967, 755 N.E.2d 98 (1st Dist. 2001)). To ascertain the legislative intent, courts must begin by examining the language of the statute, reading the statutory scheme as a whole, and construing it so that no word is rendered superfluous. (*Id.*). Clear and unambiguous statutory language must given effect, without resort to other aids of construction. (*Id.*).

Section 13-712(a) declares that it is the intent of the General Assembly that each telecommunications carrier meet minimum service quality standards in providing basic local exchange service on a non-discriminatory basis to all classes of customers. This language clearly indicates that Section 13-712, in general, was intended to foster competition and ensure that the ultimate consumer of telecommunications services, the end-user, has adequate telephone service, irrespective of what type of carrier services that consumer.

Section 712 is entitled "Basic Local Exchange Service Quality: Customer Credits," which is some support for the ILEC position that wholesale special access should not be included in the rule. On the other hand, as Staff points out, the General Assembly often referred to "basic local exchange service" in the statute, and yet, absent from Section 712(g) is any mention of this term. As Staff and the Wireless Coalition have noted, we are required to construe Section 712(g) in accordance with its plain meaning, without adding exceptions, limitations or conditions. (*Divane v. Chicago Board of Education,* 332 Ill. App. 3d 548, 553, 774 N.E.2d 361 (1st Dist. 2002); *People v. Young,* 92 Ill.2d 236, 241, 441 N.E.2d 641 (1982)).

On its face, Section 712(g) is not limited to "basic local exchange services." And clearly, when the General Assembly enacted the statute, it was familiar with the term "basic local exchange services," as it used that terms in many other places in the statute. The statute also contains a definition of "basic local exchange services" which is "[r]esidential and business lines used for local exchange telecommunications services as defined in Section 13-204 of this Act . . ." (220 ILCS 5/13-712(b)(2)). The presence of this definition is further indicia that, when drafting Section 712(g), the General

Assembly was familiar with the term “basic local exchange services.” Therefore, we conclude that the General Assembly’s exclusion of the term “basic local exchange services” from Section 712(g) is not accidental.

The legislative intent regarding the scope of this proceeding is not crystal-clear. However, when Section 13-712(g) is viewed in light of the rest of Section 712, it becomes evident that Section 13-712(g) was intended to allow the Commission to promulgate a Rule that governs those items that are involved, on a wholesale basis, in the provisioning of basic local exchange services, irrespective of whether those services, in and of themselves, are “basic local exchange services.” This construction reconciles the difference between the language in Section 712(g) and other portions of the statute, as, while the other portions mention “basic local exchange services,” 712(g) concerns what is involved in the provisioning of such services on a wholesale basis.

As AT&T points out, any other construction would effectively “gut” the Rule, as there are a broad range of wholesale services that are involved in CLEC provisioning of telecommunications services to its customers, many of which, really are not, in and of themselves, the provisioning of “basic local exchange services.” If we construed Section 712(g) to include only “basic local exchange services,” we would be placing a restriction in that statute that is not there, which we are bound by well-established principles of statutory construction to refrain from doing. (*Divane,* 332 Ill. App. 3d at 553).

We also conclude that any language in the initiating order for this docket was made only as a short-hand reference to the general statutory scheme; it did not define the scope of this docket.

We additionally note that, as Staff points out, including wholesale special access services in the Rule promotes competition in Illinois and it helps ensure that Illinois consumers receive adequate phone service, the enunciated goal of Section 712. (220 ILCS 5/13-712(a)). Therefore, inclusion of wholesale special access services in the Rule helps foster an obvious goal of legislature—to ensure that consumers receive reliable telecommunications service that is not substandard.

The Factual Arguments

Verizon provides only one factual citation in the record to support its contention that wholesale special access services are not provisioned in order to supply “basic local exchange services.” That is the rebuttal testimony of its witness, Jerry Holland, who concluded as follows: “Special access is an access service, ordered almost exclusively as an interstate service . . . .” Verizon provides no additional factual support for its conclusion that wholesale special access services are not used to provision “basic local exchange services.“ (*See,* Verizon Initial Brief at 8). This conclusion does not have a factual basis, and, therefore, we cannot consider it. (*Statler v. Catalano,* 167 Ill. App. 3d 397, 410-11, 521 N.E.2d 565 (5th Dist. 1988); *Kafka v. D.E.S., Inc.,* 265 Ill. App. 3d 310, 314, 638 N.E.2d 663 (1st Dist. 1994)).

Verizon's assertion also ignores other evidence presented, such as the rebuttal testimony of WorldCom witness Karen Furbish, who testified that WorldCom, a very large facilities-based CLEC, uses wholesale special access services it purchase from ILECs to provide service to commercial and institutional customers in Illinois. (WorldCom Ex. 1.1 at 8, 9-10). This testimony is indicia that carriers can, and do, use such wholesale special access service services to provide "basic local exchange services."

Ameritech contends that wholesale special access services "are provided to carriers primarily for long-distance and wireless services, neither of which qualifies as basic local exchange service." Ameritech provides no factual or legal basis for this conclusion, therefore, we cannot consider it. (*Statler,* 167 Ill. App. 3d at 410-11). Also, even Ameritech seems to acknowledge that wholesale special access services are used to provide basic local exchange services, as this statement contains a qualification, the word "primarily."

As was just mentioned, there is evidence establishing that wholesale special access services are used by carriers purchasing wholesale services to provision "basic local exchange services." We therefore conclude that such services can be included in the Rule.

Also, while Verizon and Ameritech argue that the testimony regarding wholesale special access services is outside the scope of this proceeding, they could have sought exclusion of this testimony through a pretrial motion to bar evidence on the subject, through objection to admission of testimony into evidence and other well-established legal procedures that were available to them. The parties contesting the inclusion of wholesale special access services in this proceeding did nothing to exclude evidence regarding the subject. If these parties were really of the opinion that wholesale special access services exceed the scope of this docket, they undoubtedly would have utilized the basic legal tools available to them to exclude the evidence that they felt exceeded the scope of this docket.

Finally, as will be explained below, since extensive evidence was presented on the issue establishing that there is an urgent need for rules governing service quality of special access services, it is evident that if this issue is not addressed here, it will merely arise in another Commission docket at another time, which would require re-litigation of a complicated issue that is already before us. Deferring the issue, therefore, would only cause the parties and Commission Staff to waste a considerable amount of time and effort and delay giving consumers the service quality they deserve.

3.) Whether there is a Need to Regulate Wholesale Special Access Services

Background

The Rule proposed by Staff provides that "[t]he services to be covered for a Level 1 carrier shall include wholesale special access services, and shall include wholesale special access measures for ordering, provisioning, and repair." (Appendix, Sec. 305).

The Position of the Wireless Coalition

Several Wireless Coalition witnesses testified that, as a matter of pattern and practice, many aspects of the special access services provided by Level 1 carriers have been poor and unreliable. Ordering processes are unclear and orders are often delayed. Also, according to these witnesses, the information the Level 1 carriers provide to Wireless Coalition members regarding ordering procedures is not consistent and it is erratic. The evidence indicated that during the first five months of 2002, Ameritech failed to timely install approximately 40% of the circuits PrimeCo ordered, and those installations were late by approximately 7 days. (*See,* Wireless Ex. 1.0 at 8). The testimony also established that the Level 1 carriers do not timely complete engineering, do not provide notice of the date of installation of special access circuits and do not install those circuits in a timely manner. Also, according to the Wireless Coalition witnesses, it often takes an inordinate amount of time before failed circuits are repaired. (*See, e. g.,* Wireless Exs. 1.0 at 4, 6; 2.0 at 11-12; 3.0 at 3-4; 5.0 at 7; 7.0 at 6).

Additionally, Wireless witnesses testified that the circuits provisioned frequently fail. That is, those circuits do not always work. When the circuits do not work, cell site-switch connections are lost, wireless telephone signals cannot be transported and wireless telephone calls cannot be completed. A single circuit failure will cause a cell site to go completely out of service, and services at cell sites served by multiple circuits can become overloaded. When a cell site goes down, ongoing telephone calls are dropped, and customers may be unable to place or receive any new telephone calls until the failed circuit is repaired. Also, the quality of the call may be adversely affected by weak signals coming from the area of a "downed cell site." (Wireless Exs. 2.0 at 6; 12; 6.0 at 6-7). Wireless Coalition members testified that the failure of special access circuits causes them unnecessary expense resulting from "handling the problems" associated with the failed circuits and a loss of revenue as a result of missed telephone calls. (Wireless Initial Brief at 21).

The Wireless Coalition also presented evidence that some Level 1 monthly performance reports are untimely and they contain data that does not match the data of the Wireless members. Those members aver that they, on many occasions, have been unable to resolve those discrepancies with the ILECs, but the ILECs have refused to attempt to resolve these disputes. (Wireless Exs. 1.0 at 5; 2.0 at 7; 6.0 at 8). Also, carriers do not provide these reports to regulatory bodies. (Tr. 586). Some carriers do not provide performance reports. (Wireless Ex. 1.0 at 5; 2.0 at 6; Tr. 225).

The Wireless Coalition contends that it loses significant revenue, and its customers experience significant problems, due to these problems with wholesale special access circuits. The Wireless Coalition therefore seeks, in this docket, to establish performance measures, standards, and remedies in order to "prompt" improvements for wholesale special access service quality. (Wireless Initial Brief at 6). The Wireless Coalition posits that in the absence of enforceable service quality rules and reporting requirements, there is no way to ensure that Level 1 ILECs will consistently provide reliable wholesale special access services. (*Id.* at 22).

The Coalition also points out that currently, most of its members purchase services pursuant to private contracts, thus, the Level 1 ILECs' Wholesale Service Quality Plans do not apply to them. The Coalition further points to evidence elicited on cross examination of Ameritech and Verizon witnesses, that ILEC reporting to the wireless carriers is very limited, and, that the measures and remedies in Ameritech's Wholesale Service Quality Plan are also very limited. The Wireless Coalition further points to evidence that Ameritech does not resolve discrepancies between its performance data and that of a coalition member, even when that information is verifiably inaccurate. (*See,* Wireless Coalition Reply Brief at 9).

The Position of Staff

Staff argues that wholesale special access has become a significant means by which carriers provide telecommunication services in Illinois. (*See, e.g.,* Tr. 424-25). Staff cites WorldCom Witness Karen Furbish, who testified:

> Yes, clearly incumbent LECs like SBC-Ameritech and Verizon are still dominant in the provision of all last-mile facilities, whether a competing carrier must order the large ILECs' facilities as UNEs, or EELs, or intrastate Special Access, or--most often--as interstate Special Access. Competitive LECs, IXCs, and wireless carriers are dependent on the ubiquitous 'last mile' facilities of incumbent LECs like SBC-Ameritech and Verizon to compete for larger-volume business and government customers, or to connect cell sites.

(*See,* WorldCom Exhibit 1.0 at 8). It is Staff's position that including Wholesale Special Access Services in the Rule recognizes the dependence of competitive carriers upon ILECs' special access services to provide telecommunication services in Illinois. Staff also argues that many carriers assert that they need wholesale service quality standards for special access services.

Ameritech's Position

Ameritech claims that imposition of special access performance measures under the Rule could create problems for existing special access services and customers. Essentially, Ameritech argues that it would be expensive, time-consuming, and disruptive to replace whatever existing arrangements Ameritech has in place with those standards and remedies imposed by Part 731. (Ameritech Exhibit 1.20 at 8; Initial Brief at 13).

Ameritech further asserts that it already provides its wholesale customers with measures, standards and remedies for wholesale special access services. It provides 69 of its wholesale special access customers with monthly performance reports. (Ameritech Initial Brief at 13-15). The Company posits that it has implemented several tools to improve its performance with regard to wholesale special access services. Ameritech further argues that there is no need to include special access services in the Rule as market has already established remedies and standards for those services. (*Id.* at 14, 16).

Ameritech also argues that, at the hearing, it was incorrectly denied the opportunity to impeach a witness with an advertisement for the witness' company-employer. According to Ameritech, such evidence can be used to impeach a witness.[2] (Ameritech Initial Brief at 16-17).

Verizon's Position

Verizon argues that the record in this docket does not support the inclusion of special access services. Verizon points to the fact that most of the evidence presented by the parties regarding the quality of wholesale special access concerned Ameritech's performance. (Verizon Initial Brief at 8-9). Verizon posits that it would be unfairly burdened with the inclusion of wholesale special access services in the Rule because Ameritech's service quality is poor. (*Id.* at 10).

Verizon additionally contends that the witnesses that testified regarding Verizon's service quality were disingenuous. (U.S.Cellular Exs. 5.0 and 6.0; Verizon Ex. 6 at 6-8). Verizon argues that the statements made by those witnesses were unsupported conclusions that were totally discredited with facts and statistics in the rebuttal testimony of its witness, Mr. Holland. Verizon notes that U.S. Cellular's counsel (counsel for the Wireless Coalition) did not cross-examine Mr. Holland. Verizon concludes that the complaint process and the Commission investigation process are much better- suited to addressing issues relating to one carrier. (Verizon Reply Brief at 23).

Commission Analysis and Conclusions

The evidence, briefly summarized above, demonstrates a need for regulation of wholesale special access services. Without regulation, consumers will continue to experience poor voice quality and phone calls that they are unable to complete. Several Wireless Coalition employees testified as to a pattern and practice of poor performance

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[2] At the evidentiary hearing, Ameritech's motion to make an offer of proof on this issue was granted.

and Ameritech provided little in the way of evidence indicating that this pattern and practice is not accurate. Moreover, it appears that currently, there is little choice for wireless carriers, that is, it appears that the wireless carriers must almost always use the services of ILECs.

We note that Ameritech does not argue that its special access services are good, it contends that it is improving those services. (*See, e.g.,* Ameritech Initial Brief at 15). While we applaud Ameritech's attempt to improve those service, implicit in its argument is an acknowledgement that the services it provides, in this context, need some improvement.

And, while Ameritech argues that it will be unduly burdened by the Rule, its evidence was not specific as to what onus it would suffer or why. Moreover, there are sufficient methods in place to allow carriers to amend their interconnection agreements to conform to new regulation. We are not persuaded by Ameritech's arguments that it will be burdened by regulation of whole special access services.

With regard to Ameritch's argument regarding impeachment of a witness with an advertisement, Ameritech cites no legal authority in support of its argument that it should have been allowed to impeach a wireless coalition witness with an advertisement. Therefore, we cannot consider this argument. (*Statler,* 167 Ill. App. 3d at 410-11). Moreover, an advertisement is an assertion, of obviously questionable factual validity, of a company. Such an unverified document, which was not authored by the witness in question, has nothing to do with the credibility of that witness, which is the subject of impeachment evidence.

Verizon argues that the evidence, in large part, indicated that the poor service experiences were with Ameritech. Verizon reasons that it should not be "punished" for Ameritech's conduct. However, there was evidence that Verizon's service was also unreliable. While Verizon contends that it established that the evidence regarding its conduct was "disingenuous," the Wireless Coalition proffered evidence indicating that generally, its statistics did not match those of the ILECs and the ILECs refused to acknowledge that their data was wrong. Thus, at best, the record reflects that the Wireless Coalition had one set of statistics, and Verizon had another set of statistics. In addition to the statistics, moreover, the Wireless Coalition presented evidence as to their general experiences with carriers, including Verizon, regarding wholesale special access services. The evidence does not establish that that the evidence proffered by the Wireless Coalition was disingenuous, or even wrong.

For the reasons stated above, we conclude that the parties have established that there is a need to include wholesale special access services in the Rule.

4.) Section 105: The Wireless Coalition's Revised Definition of Wholesale Special Access

The Wireless Coalition contends that the definition of "wholesale special access" in the Rule must encompass all elements of wholesale special access services they use to provide wireless telecommunications services. Currently, the Rule provides that:

> 'Wholesale Special Access' means a Wholesale Service utilizing a dedicated non-switched transmission path used for carrier-to-carrier services from the customer's NID (Network Interface Device) or POI (Point Of Interface) to the carrier's POI (Point Of Interface). A non-switched transmission path may include, but is not limited to, DS1, DS2, and OCn facilities as well as links for SS& signaling, database queries, and SONET ring access.

(*See,* Appendix, Sec. 105). The Wireless Coalition contends, essentially, that the transmission path for these services can be more complicated that what is expressed in the current version of the Rule, as the connections can be between: a) network elements within an incumbent LEC's network; b) the networks of different ILECs; or c) a wireless or ILEC's network and the network of a CLEC or an IXC. (*See,* Wireless Initial Brief at 23-24). The Wireless Coalition proposes the change below to incorporate these points of interconnection:

> 'Wholesale Special Access' means a Wholesale Service utilizing a dedicated non-switched transmission path used for carrier-to-carrier services from the customer's NID (Network Interface Device) or POI (Point Of Interface) to the carrier's POI (Point Of Interface) <u>to one or more of the following: (1) the Provisioning Carrier's POI (Point Of Interface); (2) Another NID or POI on the Requesting Carrier's Network; or (3) another carrier's network.</u> A non-switched transmission path may include, but is not limited to, DS1, DS2, and OCn facilities as well as links for SS7 signaling, database queries, and SONET ring access. <u>'Wholesale Special Access' includes Wholesale Special Access Services provided to a wireless carrier or other telecommunication carrier.</u>

No party objected to the Wireless Coalition's proposed change.

Commission Analysis and Conclusions

The Wireless Coalition argues, essentially that the current definition does not cover all situations involved in the use of wholesale special access services. No party has presented evidence or arguments indicating that the Wireless Coalition's argument is incorrect. Therefore, we conclude that the Rule should be amended to incorporate the change proposed by the Wireless Coalition. (*See,* Appendix, Sec. 105).

5.) Section 105: WorldCom's Revised Definition of Wholesale Special Access

WorldCom suggests that Staff's definition of Wholesale Special Access is too restrictive. (WorldCom Ex. 1.0 at 17; Initial Brief at 9-10). WorldCom's proposed Wholesale Special Access definition is as follows:

> 'Wholesale Special Access' means a Wholesale Service that provides a non-switched transmission path between two or more points, either directly, or through a central office, where bridging or multiplexing functions are performed, not utilizing ILEC end office switches. Special access services may include dedicated and shared facilities configured to support analog/voice grade service, metallic and/or telegraph service, audio, video, digital data service (DDS), digital transport and high capacity service (DS1, DS3 and OCN), collocation transport, links for SS7 signaling and database queries, SONET ring access, and broadband services.

The Position of Staff

Staff contends that WorldCom's definition provides greater detail regarding the transmission path and included services. It is Staff's view that the level of detail in WorldCom's definition may actually cause it to be interpreted in a manner that may be more restrictive than the current definition. Staff maintains that its definition is more desirable because it is more all-inclusive. Staff also points out that there is no industry consensus regarding the definition of some of the identified services.

Commission Analysis and Conclusions

We agree with Staff that WorldCom's definition is too specific and that an all-inclusive approach to the definition is more desirable. We decline to incorporate WorldCom's changes into the definition of wholesale special access services.

6.) Adoption of WorldCom's JCIG Measurements

WorldCom's Position

WorldCom, which is one of the largest facilities-based CLECs in the country, relies substantially in ILEC facilities to compete for larger business and institutional customers' "last mile." WorldCom relies upon ILECS about 90% of the time to meet these requirements. In Illinois, to provide services to business and institutional customers, WorldCom relies on Level 1 ILEC special access facilities approximately 95% of the time. WorldCom recommends that the Commission require Level 1 carriers to report wholesale special access performance, based on the set of eleven core metrics, developed by a national coalition of CLECs and IXCs (interexchange carriers). These metrics are encompassed in the JCIG special access metrics that were entered into the record attached to WorldCom Witness Furbish's Direct testimony. (WorldCom Initial Brief at 20-22; WorldCom Ex. 1.0, Appendix B).

Ameritech's Position

Ameritech argues that the Commission should reject WorldCom's proposals, as those proposals were advanced without any evidentiary support. (Ameritech Initial Brief at 21).

Verizon's Position

Verizon maintains that the Commission should not adopt WorldCom's metrics, as, according to Verizon, WorldCom did not present prefiled testimony to support these metrics. (Verizon Reply Brief at 31).

Commission Analysis and Conclusions

We decline to adopt WorldCom's set of performance measures and remedies. As Ameritech and Verizon point out, there is no evidence establishing that these measures and remedies are necessary or practicable.

h.) Section 105: Wholesale Service Emergency Situations

Background

Level 1 carriers are not considered to be in violation of a performance measure if the delay in performance is due to a Wholesale Service Emergency Situation. (Appendix, Secs. 105, 405). Subject to certain specified caveats, the definition of a "Wholesale Service Emergency Situation" is a single event that causes an interruption of service or installations affection wholesale service provided by a carrier. Those events are, in general terms: (i) a state or federal disaster; (ii) acts of third parties, such as terrorism, vandalism and riots; and (iii) severe weather conditions, such as storms, tornados, earthquakes, floods and fires. (Appendix, Sec. 105).

The Position of AT&T

AT&T argues that Section 405 of the Rule should be amended to provide that Wholesale Service Emergency Situations should be limited to performance measures that are based on benchmark standards. Most of the standards in Level 1 Wholesale Service Quality Plans are based on parity, (*i.e.,* comparison's between the ILEC's performance with respect to its customers or affiliates, and that which it provides to a wholesale customer) not benchmarks; thus, AT&T reasons that a Wholesale Service Emergency Situation will affect a Level 1 carrier to the same extent that it affects its wholesale customer. (AT&T Initial Brief at 12).

The Position of Ameritech

Ameritech argues that the circumstances mentioned in the definition of Wholesale Service Emergency Situations for Level 2 carriers should be incorporated into the definition of Wholesale Service Emergency Situations for Level 1 carriers. (Ameritech Initial Brief at 32; *See also* Secs. 405 and 610(f)).

The Position of Staff

Level 1 carriers, according to Staff, develop the details of performance standards and the related rules in their Wholesale Service Quality Plans. Staff reasons that no modification to the Level 1 definition of a Wholesale Service Emergency Situation is needed, because Level 1 carriers can, and do, further define Wholesale Service Emergencies in their Plans. (Staff Reply Brief at 22).

Commission Analysis and Conclusions

Some of the wholesale service emergency situations, such as riots and vandalism, and even some weather conditions, can be quite localized, and others, such as state or federal disasters, can be quite widespread. We therefore do not assume that the events in the definition of a “Wholesale Emergency Situation” would have the same impact on the provisioning Level 1 Carrier as it would on the receiving carrier. We therefore decline to amend the Rule.

With regard to Ameritech’s argument, we agree with Staff that a Level carrier can incorporate any modifications needed into its Wholesale Service Quality Plan, and, therefore, no modification to Section 405 is needed.

i.) Section 410: Additional Level 1 Reporting Requirements-Website Links

The Position of Ameritech

Ameritech seeks to have Section 410 revised to require the Commission Staff to post on its website a reference and a link to a carrier’s Wholesale Service Quality Plan that is posted on the carrier’s website. (Ameritech Initial Brief at 23-22).

The Position of Staff

Staff has no objection to Ameritech's proposal. (Staff Reply Brief at 22).

Commission Analysis and Conclusions

Ameritech's point is well-taken. Section 410(a) is revised as follows:

> A Wholesale Service Quality Plan adopted pursuant to Subpart E shall be posted to both the Commission's web site, <u>with a reference and a link to the pertinent carrier's Wholesale Service Quality Plan at its web site</u>, and the Level 1 carrier's web site no more than thirty (30) days after entry of the Commission's order adopting such Plan.

(*See* Appendix, Sec. 410(a)).

j.) Ameritech's Proposal to Delete Subsection 500(b)(5) (Renumbered as 505(b))

Background

Section 505(b) describes the criteria that the Commission shall consider and address when adopting a Wholesale Service Quality Plan. Generally, these criteria include the comprehensiveness, clarity, meaningfulness, and accuracy of the proposed Wholesale Service Quality Plan. (Staff Ex. 1.0 at 24-25). Subsection 505(b)(5) requires the Commission, when considering whether to adopt a Wholesale Service Quality Plan, to address and consider whether liability under the Plan's enforcement mechanism would actually accrue at meaningful and significant levels when performance standards are missed. (Appendix, Sec. 505(b)(5)). Subsection 505(b)(4) requires the Commission to also consider whether the Plan subjects the Level 1 carrier to potential liability sufficient to provide a meaningful and significant incentive to comply with the performance standards. (Appendix, Sec.505(b)(4)).

Ameritech's Position

Ameritech objects to the inclusion of the language in Subsection 505(b)(5) in the Rule. It contends that this subsection either duplicates Subsection 505(b)(4), or, it improperly expands the requirements of subsection 505(b)(4). Ameritech argues that potential liability motivates good performance. Actual liability, on the other hand, should be significant only when performance failures are significant. Whether a Plan has sufficient potential for liability, Ameritech continues, is not the same inquiry as whether liability under a Plan would actually accrue at meaningful and significant level when performance standards are significant. (Ameritech Initial Brief at 33).

The Position of Staff

Staff argues that the two subsections are not the same. Staff notes that the FCC has employed similar criteria in evaluating performance assurance plans pursuant to Section 271. (Staff Reply Brief at 23).

Commission Analysis and Conclusions

Ameritech's own arguments clarify the difference between two subsections. One asks for a determination as to potential liability, regardless of actual liability. Evidence as to potential liability concerns sufficient motivation on the part of the Level 1 carrier to provide service that is not substandard. The other subsection asks for a determination as to actual liability, which addresses an issue that is separate from motivation for good performance. Because the two issues are not the same, we do not agree with Ameritech that subsection 505(b)(5) expands subsection 505(b)(4). We also do not agree with Ameritech that subsection 500(b)(5) should be deleted.

III. Issues Applicable to Level 1 and Level 2 Carriers

a.) The Wireless Coalition's Revised Performance Measures and Remedies for Wholesale Service Access

The Position of the Wireless Coalition

The Wireless Coalition proposes its own extensive special access-related performance measures, standards and remedies for Level 1 and Level 2 carriers. (*See,* Wireless Initial Brief, Appendix A). The Coalition avers that its proposals are based on its members' experiences in the Illinois market, and their familiarity with technology. (Wireless Reply Brief at 14-16).

The Position of Staff

Staff opines that it has not had the opportunity to investigate the issues presented in the Wireless Coalition's proposed Rule; it therefore does not have sufficient information at this time to confirm each of the individual issues raised by the Wireless Coalition. Staff recognizes that this proceeding has provided significant evidence that issues are not being resolved in a manner that supports competition, but it is of the opinion that the Rule, in its current form, is broad enough to address most wholesale special access situations.

Staff believes that the Coalition's issues are more appropriately raised in light of the differing systems, remedy plans and business rules of each of the Level 1 carriers. Staff notes that it will also have an opportunity to revisit the Wireless Coalition's issues regarding Level 1 carriers, when the Level 1 carriers file their respective Wholesale Service Quality Plans with the Commission.

Regarding Level 2 carriers, Staff opines that, at this time, the level of Wholesale Special Access requests of Level 2 carriers does not appear to be sufficient to justify establishing standards applicable to Level 2 carriers. Staff points out that the Wireless Coalition concedes that its members purchase approximately 95-100% of their intrastate, intraLATA, wholesale special access services from Level 1 carriers.

The Position of Citizens

Citizens maintains that the rule proposed by the Wireless Coalition should not be adopted because has provided no explanation as to how it has formulated the measures it proffers. (Citizens Reply Brief at 10-11).

The Position of Ameritech

Ameritech argues that the remedies proposed by the Wireless Coalition in its proposed Rule are exorbitant. (Ameritech Initial Brief at 19). Citing specific Wireless evidence, it contends that there is no evidence to show that the proposals are feasible, practicable, necessary or preferable. (*Id.* at 17; *See also* Tr. 647-49; Wireless Ex. 1.0 at 10). It contends that the proper place to address the Wireless Coalition's desire for service quality is through the complaint process. (Ameritech Initial Brief at 21).

The Position of Verizon

Verizon avers that the Commission should not adopt the metrics proffered by the Wireless Coalition. Verizon posits that the Wireless Coalition did not provide testimony to support the metrics included in its proposal. (Verizon Reply Brief at 31).

Commission Analysis and Conclusions

We note that there was no evidence establishing that the standards and remedies proffered by the Wireless Carriers are reasonable. For example, the Rule proposed by the Wireless Carriers requires provision of a Firm Order Conformation no later than three business days from the date on which the requesting carrier orders a wholesale special access service. (Wireless Initial Brief, Ex. A, Sec. 310(b)). There is no evidence indicating that it is reasonable to require an ILEC to provide a Firm Order Confirmation within three business days. We also note that the testimony established that the circuits are highly specialized, that is, they are tailored to meet the needs of the requesting carrier, which is some indication that it takes time to provision such services.

We are concerned, as is Staff, that we will be imposing rules on carriers without adequate evidence that such rules are reasonable. And, while the Coalition contends that its measures are based on its experiences, those experiences are on the receiving end, not on the provisioning end. The two are not the same.

Moreover, Section 310 provides, in pertinent part:

> The services to be covered for a Level 1 carrier shall include, but not be limited to . . . wholesale special access services, and shall include wholesale special access measures for ordering, provisioning and repair.

(Appendix, Sec. 310). Thus, the Rule requires Level 1 carriers to develop measures and remedies for the ordering provisioning and repair of wholesale special access circuits. There is no indication in this record that such development will not be fruitful. As for Level 2 carriers, as Staff points out, at this time, the amount of Wholesale Special Access requests of Level 2 carriers does not appear to be sufficient to justify establishing standards applicable to Level 2 carriers. We therefore decline to incorporate the Wireless Coalition's revised performance measures and remedies into the Rule.

IV. Issues Applicable to Level 2 Carriers

Background

Currently, there are three Level 2 carriers in Illinois. Each of the three has approximately 100,000 access lines. The Level 2 carriers serve approximately 5% of Illinois' total access lines.

In general, when establishing the Level 2 standards, the associated remedies, and the relationship between the providing carrier and the requesting carrier, Staff "kept it simple." While many of the Level 1 performance standards can be measured in seconds, minutes, or hours, the Level 2 performance standards contained in Section 605 are measured in hours or days. (Staff Initial Brief at 52-56; Appendix, Sec. 605). The Rule also subjects Level 2 carriers to a minimal set of performance measures. They concern:

--unbundled local loops
--Interconnection trunks
--resold local services
--collocation
--loss notification
--customer service records.

(*See,* Appendix, Sec. 605).

a.) Section 605: Wholesale Service Quality Plans vs. the Rules for Level 2 Carriers

The Position of Staff

Staff sees the Rules for Level 2 carriers as a set of default regulations, to be imposed only when a Level 2 carrier does not negotiate its own performance with CLECs and place those standard in an interconnection agreement. (Staff Reply Brief at 46-47; Appendix, Sec. 630).

However, the Rule for Level 2 carriers does not allow for the type of Wholesale Service Quality Plan that Level 1 carriers have. In Staff's opinion, the statistical analysis used for in the Wholesale Service Quality Plans for Level 1 carriers is not appropriate for Level 2 carriers, who have a much lower volume of wholesale service that the Level 1 carriers. (*See,* Staff Ex. 10.0 at 17). Staff points out that Level 1 carriers have already made substantial investments in the automated operational support systems that are used to make the mathematical computations that are necessary for the statistical analysis used for Level 1 carriers.

According to Staff, development of individual Level 2 Wholesale Service Quality Plans will require the investment of time and money by both the provisioning carrier submitting the plan, and the requesting carriers that desire to comment on the plan. (Staff Ex. 7.0 at 18-19). In Staff's opinion, allowing all Level 2 carriers the option of being treated as Level 1 carriers would force requesting carriers to comment on their plans and participate in those proceedings, thus placing an unreasonable burden and expense on the requesting carriers, particularly the smaller CLECs, who purchase service from a Level 2 carrier.

Citizens' Position

Citizens, one of the three Level 2 carriers, does not desire the simplicity that the Rule would afford it. Rather, Citizens contends that the Commission should be able to defer establishing standards for a Level 2 carrier, if that carrier so desires, until company-specific Level 2 Wholesale Service Quality Plans can be filed, reviewed and approved by the Commission. Citizens avers that there has been no comparison, in this docket, between the burden placed on Level 2 carriers by Staff's proposed Rule and the burden imposed by a Wholesale Service Quality Plan. (Citizens Initial Brief at 33-34; 37). It points out that implicit in Staff's four-level approach to the Rule is an understanding that there cannot be a one-size-fits-all approach to wholesale providers. Citizens proposes that the Rule should include the following language:

> . . . every Level 2 carrier may file with the Commission for review and approval a Wholesale Service Quality Plan as specified in, and pursuant to, Subparts b, c, and d, of this Part. For any filing due after April 1, 2004, if a Level 2

> carrier proposes to maintain, without any additions, deletions or modifications, its existing Wholesale Service Quality Plan, the Level 2 carrier may file, in lieu of filing a new Wholesale Service Quality Plan, a verified statement indicating that it proposes to maintain in effect, without any additions, deletions or modifications, its existing Wholesale Service Quality Plan . . .

Citizens' proposal provides for Commission review of a Level 2 Wholesale Service Quality Plan, which is similar to the procedures for Commission review of a Level 1 Wholesale Service Quality Plan. (Citizens Ex. 1.1, pp. 20-21). Citizens' proposal also includes the standards that must be included in such a plan. (*Id.*). Under Citizens' proposal, a Level 2 Carrier would not be required to have a Wholesale Service Quality Plan, but it could do so, if that company was so inclined. Moreover, an interested CLEC would not be obliged to participate in the Commission review proceeding. Citizens posits that the majority of time and expense involved in developing and litigating the Wholesale Service Quality Plan would not be borne by interested CLECs, rather, it would be borne by the Level 2 ILEC proffering the Plan.

The Position of the IRCA

The IRCA takes the position that development of company-specific Wholesale Service Quality Plans could take years, leaving CLECs without adequate minimum service standards in the meantime. It maintains that the Rule provides standards for only six performance measures and there is no evidence indicating that complying with these six measures would be unduly burdensome. (IRCA Initial Brief at 8; Reply at 18-20). The IRCA additionally points to Section 630 of the Rule, which provides:

Effect of Interconnection Agreement

> If a Level 2 carrier provides wholesale service to another carrier pursuant to an interconnection agreement, and those carriers have negotiated the interconnection agreement or an amendment to the interconnection agreement after the effective date of this Part that expressly references this Section and it amends any of the standards and requirements contained in this Subpart, those standards and requirements contained in this Subpart shall not apply to such carriers if, but only to the extent that it is so provided in the interconnection agreement or amendment, and provided further that the changes from or to the standards and requirements contained in this Subpart are not contrary to the public interest. . .

(Appendix, Sec. 630). The IRCA posits that this Rule allows a carrier to develop a Plan for the delivery of wholesale service, on an informal basis, that conforms to the requirements of the Rule, without the delay and expense involved in the formal procedure Citizens proffers for the development of a Wholesale Service Quality Plan. (IRCA Reply Brief at 20).

Commission Analysis and Conclusions

We agree with the IRCA that Section 630 of the Rule provides an informal mechanism, by which, a Level 2 carrier can develop company-specific measures and remedies in the same way a Wholesale Service Quality Plan would. Section 630 alleviates any need for a formal Level 2 Wholesale Service Quality Plan procedure. We concur, therefore, with Staff and the IRCA that there is no need for Citizens' procedure for formal development of a Wholesale Service Quality Plan.

b.) 100% Benchmarks

Background

The performance standards expected of Level 1 carriers, generally, provide for an assessment of what is an average monthly performance, based on parity with a retail customer, or with an affiliate, and then application of a statistical formula that allows for random error, which is approximately five percent. The benchmarks that are used in Level 1 plans are generally also less than 100%, which also allows for random error.

Thus, through the application of statistical formulae that allow for "random error," Level 1 carriers provide service to a CLEC that is less than 100% of parity with an affiliate or retail customer, and still not have to incur any remedy.

With regard to the three Illinois Level 2 carriers, however, the Rule uses "hard benchmarks." Generally, performance that does not meet the "hard benchmarks" is substandard performance, subjecting a Level 2 carrier to incur a remedy, without any allowance for random error. In the event that a Level 2 ILEC provides service to a connecting carrier that fails to meet the standards established in Section 605, a credit is applied to the purchasing carrier's bill. (Appendix, Sec. 615; Staff Ex. 4.0 at 10).

The Position of Staff

Staff acknowledges that the goals of TA 96, which establishes parity as the basic standard for quality of service provided by ILECs to interconnecting carriers, can be achieved, if the wholesale services provided by an ILEC to an unaffiliated competitor is equal to the service the ILEC provides to its affiliates or to its retail customers. Implicit in this acknowledgement is a preference for parity of performance, which is better achieved with standards that have some "cushion," as opposed to hard benchmarks.

However, as a practical matter, Staff opines that it is an extremely complex endeavor to do parity calculations for small volumes of orders. Benchmark standards minimize the reliance on statistical testing when determining whether acceptable performance has been provided or achieved. (Staff Ex. 4.0 at 8). In Staff's opinion, statistical testing methods, such as parity testing or expressing standards as "a percentage within" a standard, could be administratively burdensome on Level 2 carriers.

The testimony presented by Staff established that if statistical methods were used on the low volumes of services provided by Level 2 carriers, only small-sample techniques could be recommended for use. The "power" of small-sample techniques is problematic; therefore, the statistics achieved are less reliable when there are small samples. (*See, e.g.,* Staff Ex. 4.0 at 9).

Staff also points out that the existing Plans for Level 1 carriers currently contain some benchmark standards. Staff is also of the opinion that benchmarks provide more consistency with other Commission rules regulating service quality, such as Code Parts 730 and 732, which contain hard benchmark standards.

The Position of Citizens

Citizens objects to Staff's proposed use of 100% benchmarks. Citizens points out that no evidence was presented as to how much a Level 2 carrier would be required to pay, if 100% benchmarks were imposed. Citizens additionally points out that Level 1 carriers are currently allowed a little "leeway," through use of statistical analysis, which is not afforded through use of 'hard benchmarks." (Citizens Initial Brief at 22-24). Citizens further posits that it is technically impossible for any carrier to comply with every provision or report order on time, every time. (*Id.* at 25).

Citizens proposes, instead of a 100% benchmark, to use a 90% standard for all provisioning benchmarks and a 95% standard for all repair benchmarks. (*Id.* at 27-28). Citizen's points to 220 ILCS 5/13-712(g), which requires that standards be set and remedies be established to "ensure enforcement of the rules." Citizens believes that anything beyond such enforcement is just a windfall to a CLEC. (*Id.* at 14). Citizens further contends that, pursuant to 220 ILCS 5/13-712(d)(4), CLECs are already reimbursed by ILECs when a violation of a service quality standard is caused by a wholesale carrier. Thus, Citizens is of the opinion that a wholesale customer should not be afforded any additional compensation. (*Id.* at 26).

The Position of AT&T

AT&T, also, supports a 95% benchmark for Level 2 carriers. (AT&T Initial Brief at 12).

The Position of the IRCA

The IRCA argues that a 100% standard is necessary so that CLECs are assured that Level 2 carriers meet the standards in the Rule. (IRCA Initial Brief, at 12). The IRCA also posits that it is far from clear how the percentages proposed by Citizens would be applied. (IRCA Reply Brief at 16-17).

Commission Analysis and Conclusions

We note at the outset that Citizens is the only one of the three Level 2 carriers to contest the Level 2 benchmarks. We also note that the evidence indicates that currently, Level 2 carriers do not provide much in the way of wholesale service and the evidence indicates that there is little customer dissatisfaction with the wholesale services that Citizens does provide. (Citizens Ex. 2.0 at 36). These two facts are some indicia that Citizens will not be burdened by the standards that Staff seeks to impose on it. Finally, we note that the measures and remedies in the rule are conservative in nature.

However, Citizens' proposal to use a 90% standard for provisioning benchmarks and a 95% standard for repair benchmarks is not without some merit. Currently, many of the measures in Level 1 Plans are not assessed at 100% of the benchmark, thus affording such ILECs a "cushion" for random error. The problem is that, for Level 2 carriers, the volume of transactions is low. According to the undisputed testimony of Dr. Patrick, random error occurs in large samples. Thus, for the low volume of transactions that Level 2 carriers currently experience, it is not mathematically sound to assess performance at 90% or 95%. (Staff Ex. 4.0 at 9). Also, as the IRCA points out, it would be difficult to determine how to apply the percentages Citizens seeks to impose, which, undoubtedly, will lead to Level 2-CLEC disputes.

Furthermore, while it is true that currently, there are mechanisms, by which, a CLEC is reimbursed when the substandard local exchange service it provides is due to ILEC error. However, faulty provisioning results in losses of customers, losses of good will, and the like, for which, the CLEC is not reimbursed. (*See,* 220 ILLCLS 5/13-712(d)(4)). Therefore, we decline to presume, as Citizens suggests, that the statutory remedies in Section 712(d)(4) of the Act for substandard service will make a CLEC whole. We therefore decline to adopt Citizens' 90 and 95% benchmarks.

c.) Thresholds

Citizens' Position

The evidence established that although Citizens is the third-largest ILEC in Illinois, its volume of wholesale collocation orders, unbundled loops, resold local services and other wholesale services is minimal. Citizens argues that therefore, the Rule should include a threshold of wholesale activity for Level 2 carriers in order to give those carriers an opportunity to "gear up" and dedicate resources necessary to meet the Part 731 standards. Citizens suggests the following thresholds:

Unbundled Local Loops: 25 orders per (calendar) quarter
Interconnection Trunks: 10 orders per (calendar) quarter
Resold Local Services: 25 orders per (calendar) quarter

The Position of Staff

Staff contends that Citizens' proposed thresholds are unduly complicated and they would create unnecessary confusion, for very little benefit. (Staff Reply Brief at 51-52).

The Position of the IRCA

The IRCA contends that the Commission should not adopt Citizens' proposed thresholds. (*See, e.g.,* IRCA Reply at 16-20). The IRCA also avers that the thresholds posed by Citizens can result in "on-again off-again" performance standards. (*Id.* at 12-13).

Commission Analysis and Conclusions

We agree with Staff and the IRCA that Citizens' proposed thresholds are subject to varying interpretations, thus leading to the potential for unnecessary disputes between the Level 2 ILEC and a CLEC. For example, it is not clear whether the threshold would apply during the month with the threshold activity, whether it would include the particular CLEC in question, and whether it would continue, or stop, in the months following the threshold activity, if the Level 2 carrier did not meet the threshold in those months. Therefore, we decline to adopt Citizens' proposal on this issue.

d.) Caps on the Amount of Remedies

The Position of Citizens

Citizens proposes a "cap" on the amount a Level 2 carrier would have to credit a CLEC, equal to 10 times the monthly recurring charge for the service in question. (Citizens Initial Brief at 9).

The Position of Staff

Staff opposes any cap on Level 2 remedies. Staff opines that caps can impede competition, as they allow an ILEC the opportunity to calculate the amount of misses that will result in the maximum possible remedy and then determine whether it is worthwhile to engage in anti-competitive behavior, *i.e.,* deliberately provide a CLEC, or CLECs with substandard service in an effort to force a CLEC, or CLECs out of business. (Staff Reply Brief at 56).

The Position of the IRCA

The IRCA objects to Citizens' proposed the use of caps. According to the IRCA, a cap on the amount of remedies provides a disincentive for a Level 2 carrier to meet the standards for all carriers. The IRCA shares Staff's opinion, that caps can be manipulated for anti-competitive purposes. (IRCA Initial Brief at 12-13,16).

Commission Analysis and Conclusions

We agree with Staff and the IRCA that the imposition of caps on penalties can provide an incentive for an anti-competitive assessment of the maximum cap, in an effort to drive a CLEC or CLECs out of business. Therefore, we are not inclined to impose a cap on remedies.

e.) The Exclusions in Section 610(e)(1) for Wholesale Customer Error

The Position of Staff

The Rule provides for seven fact-specific situations in which a Level 2 carrier is excused from meeting the applicable standards. These exclusions are consistent with the exclusions in 220 ILCS 5/13-712(e)(6), which concerns credits for substandard retail services. For example, if a Level 2 carrier is unable to provision an Unbundled Loop in five days as a result of a wholesale customer missing an appointment, the Level 2 carrier in question would not be subject to paying or crediting any remedies. (*See,* Appendix, Secs. 610(f)).

Citizens contends that the exclusions proposed by Staff only focus on situations in which the wholesale carrier (the ordering carrier) causes the substandard performance. Citizens posits that a Level 2 carrier should not be deemed to violate the standards if the substandard performance is caused by the end-user retail customer, whether it is due to a willful action, or, due to malfunctioning equipment owned or operated by the end-user customer. (Citizens Initial Brief at 30). Accordingly, Citizens proposes that the Rule include the following additional language in Part 610(f)(3):

> The standard set forth in this Subpart will not be considered to be violated for the period of delay if such delay is due to the following:
>
> 1) as a result of the negligent or willful act on the part of the wholesale customer or <u>the end-user retail customer</u>;
>
> 2) as a result of a malfunction of equipment owned or operated by the wholesale customer <u>or the end-user retail customer</u>*;*

The Position of Staff

Staff agrees with Citizens that the proposed language should be added.

Commission Analysis and Conclusions

We agree with Citizens and Staff that the above-cited language should be incorporated in the Rule. The Rule will be amended to reflect that language. (*See,* Appendix, Sec. 610(f)).

f.) Section 610: Citizens' Contention that the Requisites for Loss Notification and CSRs are Vague

The Position of Citizens

Citizens argues that it is unable to comply with the standards in the Rule. Citizens also objects to the requirement that loss notification and CSRs must be provided within 24 hours. It maintains that the standards, as written, are vague, as they do not specify what events trigger the 24-hour periods for compliance. Absent further clarification in the Rule, Citizens maintains that CLECs could interpret the Rule in different ways, thus leaving the possibility of future disputes. (Citizens Initial Brief at 15-16). Citizens also finds the proposed definition of Customer Service Records to be incomplete, as it does not mention billing and credit information or non-regulated services. (*Id.* at 8-9; 17).

The Position of the IRCA

The IRCA finds Staff's Rule, as proposed, to be unambiguous. (IRCA Reply Brief at 11-12). In response to Citizens' contention that it should not be required to meet most of the standards in the Rule, the IRCA points out that the sole basis for Citizens' assertion that it should not be subject to the requirements mentioned above is the following testimony:

> Q: Does CTC-Illinois believe it can meet the wholesale service performance measures and standards proposed by Staff?
>
> A: No.

(Citizens Ex. 2.0, lines 722-24). The IRCA contends that this factually unsupported conclusion should not be considered by the Commission.

The Position of Gallatin River

Gallatin River is one of the three Illinois Level 2 CLECs. Gallatin River finds the Level 2 rules to be acceptable, in their totality. (Gallatin River Initial Brief at 1-2).

Commission Analysis and Conclusions

We agree with the IRCA that the testimony, upon which, Citizens bases its conclusion that it should not be required to meet the performance standards is too vague to establish the proposition that the performance standards should not be adopted. Lacking from this testimony is an explanation as to why or how the standards cannot be met. We cannot consider such factually unsupported conclusions. (*Statler,* 167 Ill. App. 3d at 410-11). Even if we were to consider such a conclusion, there is no evidence that the minimum service obligations for Level 2 carriers are unduly burdensome. Citizens is one of the three Level 2 carriers and it is the only Level 2 carrier that objects to the standards imposed by the Rule. Therefore, we are not persuaded by Citizens' general contention that it cannot meet the standards imposed on Level 2 carriers by the Rule.

Loss Notification

The Rule currently provides that Level 2 carriers shall provide Loss Notification within 24 hours, without defining when that 24-hour period commences. (*See,* Appendix, Sec. 610(d)). However, it is clear from the testimony provided that the parties intended to require notification within 24 hours following receipt of the information triggering a Loss Notification, *i.e.,* information that a customer has decided to switch its service. Therefore, we conclude that the portion of Section 610(d) regarding Loss Notification should be changed to read as follows:

d) Loss Notifications- Level 2 carriers shall provide Loss Notifications within the following timeframes <u>from receipt of information that a carrier has lost and end-user customer</u>:

1) UNE-Platform	-within 24 hours
2) Resale	-within 24 hours

(See, Appendix, Sec. 610(d)).

CSRs

Currently, the Rule provides that CSRs must be provided to the "carrier requesting the CSR" within 24 hours. (*See,* Appendix, Sec. 731.610(e)). It is evident, from this language, that the "triggering event" for a CSR is the request for a CSR. So that it is abundantly clear, we shall change the Rule to read as follows:

e) Customer Service Record – Level 2 carriers shall provide CSRs to the carrier requesting the CSR within 24 hours <u>from that request.</u>

(See, Appendix, Sec. 610(e)).

The definition of a CSR is the following:

> account information that a providing carrier maintains about an end user and includes, but is not limited to the billing name, service address and billing address of the end user. . . .

(Appendix, Sec. 105). Contrary to Citizens' assertion, the Rule is not ambiguous regarding end-user billing information. Moreover, since the rule does not mention non-regulated services, it is clear that none are required to appear on a CSR. Therefore, Citizens' remaining arguments regarding CSRs are without merit.

g.) Sections 605 and 610 (Renumbered as Sections 610 and 615): Collocation

Staff's Position

Staff is of the opinion that the Rules should include Level 2 measures for collocation. Citing TA 96, staff contends that state commissions may impose quality standards on carriers in addition to those imposed by the FCC. Staff further points out that, with respect to virtual collocation, a Level 2 carrier would have more time under the Rule that pursuant to FCC standards. (Staff Reply at 47-48; 47 U.S.C. Secs. 253(b) and (e)(2)).

The IRCA's Position

The IRCA contends that the Rule is plain and unambiguous, as is. The IRCA posits that the Rule does not require ILECS to repair the facilities of a CLEC. (IRCA Reply Brief at 14).

Citizens' Position

Citizens contends that Level 2 carriers should not be subject to the standards set forth in the rule relating to collocation, such as firm order confirmations, and provisioning and repair standards for collocation. Citizens maintains that Sections 610 and 615 are inconsistent with the collocation standards and requirements established by the FCC, as Staff's proposal does not refer to collocation standards established by the ILEC. The FCC standards provide:

> Within ten days after receiving an application for physical Collation an incumbent LEC must inform the requesting carrier whether the application meets each of the incumbent LEC's established collocation standards.

(47 C.F.R. Sec. 51.323(I)(1)).

Those standards further provide:

> Except as stated in paragraphs (l)(3) and (l)(4) of this section an incumbent LEC must complete provisioning of a requested physical Collocation arrangement within 90 days after receiving an application that meets the incumbent LEC's established collocation application standards.

(47 C.F.R. Secs. 51.323(l)(2)). Citizens points to Sections 51.323(l)(3) and (l)(4) of the federal regulations, which provide exceptions to the 90-day provisioning standard, based upon whether the ILEC has timely received an affirmative notification to proceed from the CLEC after the CLEC has received a price quotation for collocation. (47 C.F.R. Secs. 51.323(l)(3) and (l)(4); Citizens Initial Brief at 12-14). Thus, Citizens argues that Section 610(b) requires a Level 2 carrier to complete the provisioning requirements for collocation, regardless of whether that CLEC has affirmatively responded to a price quote for collocation. Citizens contends that the proposed Rule, therefore, could require Level 2 carriers to make a choice between a.) not proceeding with collocation following delivery of a price quote and therefore risk being subject to the remedies imposed by the Rule, or, to b.) proceed with collocation to meet the 90-day provisioning deadline without an affirmative response to a price quote, and risk not being paid by the CLEC for collocation.

Citizens also argues that the proposed repair and maintenance standards for collocation are ambiguous and incomplete. It points out that, for virtual collocation, the ILEC supplies the equipment, however, for physical collocation, the CLEC supplies the equipment. Yet, the Rule, as proposed by Staff, does not differentiate as to whose equipment must be repaired. (Citizens Initial Brief at 13-14). Citizens also opines that the proposed Rule for completing repairs will potentially give Level 2 carriers more time to complete repairs than is required by FCC standards. (*Id.* at 15).

Commission Analysis and Conclusions

Citizens' argument that the Rule conflicts with FCC regulations requiring collocation within 90 days following the receipt of an applications that meets the ILEC's collocation standards ignores the second bullet point found in Section 610(b), (now Section 610(b)(2)) which provides that provisioning intervals will not apply, if a Level 2 carrier demonstrates that the request is not technically feasible and/or that the requested facilities are not available. (Appendix, Sec. 610(b)). We agree with the IRCA, furthermore, that the Rule clearly does not require an ILEC to repair CLEC-owned collocated facilities.

However, with regard to the "Hobson's choice" argument Citizens makes (concerning choosing between not proceeding with collocation or proceeding with the order without an affirmative response from the requesting carrier, only to risk not being paid), we conclude that Section 610(b) of the Rule should be amended to read as follows:

4) Collocation -within 90 business days <u>following an affirmative written response from the requesting carrier as to the terms of collocation</u>

(*See,* Appendix, Sec. 610(b)).

h.) Section 605 (Renumbered as 610): Unbundled Local Loops for Advanced Services

The Position of Citizens

Citizens objects to being required to condition and provision Unbundled Local Loops for advanced services within eight days, which is a requirement in Section 610. Citizens points out that the evidence established that its wholesale customers have not had any problems with being provisioned such loops. Also, within the last 18 months, it has not received a request for such services. (Citizens Initial Brief at 18) Also, Citizens claims that it is simply not able to provide unbundled loops used for advanced services within eight days, as, according to Citizens, conditioning loops for advanced services in rural areas can take a considerable amount of travel time. (*Id.* at 19).

Citizens contends that advanced services are not mentioned in the service requirements set forth in 220 ILCS 5/13-712, or in the order initiating this docket; thus, it concludes that advanced services are outside the scope of this proceeding. It also argues that including advanced services in what is required of an ILEC to provision is discriminatory, as the statute does not contain requirements for CLECs to provision or repair loops used for DSL or other advanced services. (Citizens Reply Brief at 9).

Citizens seeks to have the proposed performance standards for Level 2 carriers apply only to "analog" local loops provisioned for basic local exchange services in Section 105. Citizens also seeks to have the word "advanced services" deleted from Section 610(b). (Citizens Initial Brief at 20).

The Position of Staff

Staff argues that Unbundled Loop Return should in the Rule. Staff points out that it has received many many complaints from consumers who are not experiencing a smooth transition upon the transfer from one local exchange carrier to another. (*See,* Appendix, Sec. 105; Staff Ex. 5.0 at 4). Staff makes no argument concerning unbundled local loops for advanced services.

The Position of the IRCA

The IRCA posits that the General Assembly's omission of the term "basic local exchange services" from Section 712(g), the enabling statute, evinces its intention to adopt wholesale service quality standards for more than just loops to provide basic local exchange services. Because ILECS are already required by the Act to provide wholesale services beyond basic local exchange services, the IRCA posits that the Commission should adopt rules governing those items that are provisioned on a wholesale basis that exceed basic local exchange services. Thus, the IRCA Reasons that the Commission should reject Citizens' proposal. (IRCA Reply Brief at 10-11; 220 ILCS 5/13-801(d)(5)).

Commission Analysis and Conclusions

It appears, from a review of the record and the proposed Rule, that the media for provisioning basic local exchange services and advanced services are intertwined. Based on the record before us, it does not appear practicable to segregate advanced services in all situations, as the loop may have included those services before it needs to be conditioned, or after, it has been so conditioned, or, as a part of a group of services that includes basic telephone services and advanced services. We therefore decline to adopt Citizens' proposal to exclude advanced service from the Rules in question.

However, to address Citizens' contention that its employees must physically alter local loops in rural areas, thus requiring a considerable amount of travel, the Rule will be modified to provide that such conditioning much take place within 14 business days from receipt of an accurate and complete service request. (*See,* Appendix, Sec. 610(b)(4)).

As was explained in the section of this order discussing application of Section 712 to wholesale special access services, (Sec. 1(g)(2)) this docket is not limited to "basic local exchange services." And, as was discussed in the Section of this order addressing Level 1 Wholesale Service Quality Plans, the record demonstrates a legitimate need for making different requirements of different carriers. Including advanced services in the rule does not exceed the scope of this docket and requiring Level 2 carriers, who are ILECs, to provide such services, when CLECs are not so required does not violate the equal protection clauses of the Illinois and United States constitutions.

V. Level 3 Carriers, or Carriers with Rural Exemptions

Background

Level 3 carriers are Illinois Local Exchange Carriers that have a Rural Exemption from the obligations of Section 251(c) of TA 96. (Appendix, Section 115(c); 47 U.S.C. Sec. 251(c)).

No party has objected to the provisions for Level 3 carriers.

VI. Issues Applicable to Level 4 Carriers

Background

Level 4 carriers are LECs that do not have Section 251(c) obligations under the Telecommunications Act and also are not Level 3 carriers. (Appendix, Sec. 115; Staff Ex. 1.0 at 18). Level 4 carriers are subject to service quality standards for CSRs, Unbundled Loop Returns, and Loss Notifications. (Appendix, Sec. 805). Level 4 carriers must provide these services within 24 hours and there are accompanying remedies for failure to provide these services in a timely fashion. (*Id.* at Secs. 810, 815).

The Rule allows a Level 4 carrier to be exempt from the obligations of Level 1 and Level 2 carriers, until such time as the Level 4 carrier receives a bona fide request for a Level 2 wholesale service (a service beyond the Level 4 performance measures) and agrees to provide such services, or, when the carrier becomes legally obligated to provide such services. (*Appendix,* Sec. 820). In such an instance, that carrier may be required, after notice and a hearing, to comply with some or all of the Level 2 requirements. At such a hearing, the Commission is required to consider factors such as technical or economic feasibility, expected demand, or cost to the carrier. (Staff Ex. 1.0 at 29).

a.) Should Level 4 Standards be Imposed?

The Position of AT&T

AT&T, a Level 4 carrier, does not support the imposition of Level 4 standards. AT&T argues that Level 4 performance measures should not be imposed because Level 4 carriers have no legal obligation to offer wholesale services. AT&T seeks to change the Rule to require that Level 4 standards would not be applicable to a Level 4 carrier unless and until the time when the carrier became required to provide unbundled services pursuant to 47 U.S.C. Sec. 251(c). AT&T also contends that Level 4 carriers should not be subject to 100% benchmarks and it seeks a modification to provide for 95% benchmarks. (AT&T Initial Brief at 12-13).

AT&T maintains that Verizon provides no support for its contention that Level 4 carriers should be subject to Level 2 requirements. According to AT&T, there is no compelling business reason to impose Level 2 requirements on CLECs, since CLECs do not provide wholesale services. (AT&T Reply Brief at 10).

The Position of WorldCom

WorldCom, a Level 4 carrier, finds the imposition of Level 4 performance measures to be premature. WorldCom reasons that there are ongoing 13-state CLEC-to-CLEC migration collaboratives. Thus, WorldCom seeks to wait to set benchmarks until the collaborative establishes its processes, before benchmarks are imposed. WorldCom contends that it has not been determined that the same time-frame used for larger Level 1 ILECs should apply to Level 4 CLECs, whose processes are newer, or are less advanced, than those of ILECs. (WorldCom Initial Brief at l7-18).

The Position of Allegiance

Allegiance, a group of Level 4 carriers, argues that Level 4 should not include performance standards and remedy payment requirements regarding Unbundled Loop Returns, Loss Notification and Customer Service Records. (Allegiance Initial Brief at 15-18). Allegiance contends, essentially, that because most end-users switch from ILEC to CLEC, there really is no current problem with loss notification from CLEC to ILEC, and there is no need to “fix” a problem that does not exist. (*Id.* at 18, Reply Brief at 24). Allegiance also contends that the need to provide Unbundled Loop Returns and CSRs is likely to be infrequent, and it does not justify, on a cost basis, establishment of a sophisticated process for executing these functions.

Allegiance points out that currently, Level 1 carriers control in excess of 80% of the Illinois access lines and they have sophisticated, automated OSS systems, procedures and methods. In contrast, Allegiance points out, Level 4 carriers, which are called upon much less frequently to provide wholesale services, generally have manual systems that are much less sophisticated than those of a Level 1 carrier. (Allegiance Initial Brief at 15-18).

Allegiance further posits that Level 4 carriers do not charge Level 1 carriers for Unbundled Loop Returns and CSRs, thus, the Rule would require Level 4 carriers to give Level 1 carriers a credit for a service, for which, the Level 4 carrier was not imposing in the first place. (*Id.* at 16). Allegiance is of the opinion that, therefore, Level 4 carriers will begin to charge Level 1 carriers for these two services, and the retail customers will be required to bear the cost. In contrast, Allegiance points out that a Level 1 carrier in the same situation will receive revenues, when a customer switches to another provider, in the form of provisioning UNEs or other wholesale-for-retail services. (*Id.* at 17-18).

Allegiance views Staff's evidence that the Commission receives many, many complaints regarding the double-billing that occurs after a customer has switched from one carrier to another as "anecdotal," as only "bad" customer experiences come to Staff's attention. (Allegiance Reply Brief at 24).

The Position of Staff

Staff points out generally, the Rule is designed to protect the end-user consumer, for whom, there is no distinction between a CLEC and an ILEC. (Staff Reply Brief at 60-61). When Staff devised the performance measures applicable to Level 4 carriers, it did not contemplate the use of sophisticated OSS systems. Rather, Staff devised the time-frames in the Rule for simple systems. Staff additionally points out that the standards and remedies it imposes on Level 4 carriers are minimal. Staff is of the opinion that no further deference to the CLECs is warranted.

The Position of Verizon

Verizon points out that from an end-user's perspective, it does not matter whether a problem with telecommunications service is caused by a Level 1 carrier or a Level 4 carrier. Verizon proposes to eliminate the Level 4 classification and hold all Level 4 carriers to the standards set forth for Level 2 carriers. Citing the testimony of its witness, Louis Agro, Verizon contends that there is no reason in the record to support the premise that Level 4 carriers should be treated differently than Level 2 carriers. In the alternative, Verizon proposes that the penalties associated with Level 4 failures should be increased to the level that is equal to Level 2 penalties. Verizon additionally argues that imposing differing penalties on different carriers is disparate treatment. (Verizon Initial Brief at 25, 26).

Verizon avers that, in effect, the CLECs are asserting that they should be allowed to provide services in any manner, without regard to the end-users. Verizon further argues that WorldCom has not explained the connection between the collaboratives it mentions and Staff's "watered-down" requirements for Level 4 CLECs. (Verizon Reply Brief at 29030).

The Position of Ameritech

The Rule, Ameritech opines, gives Level 4 carriers a "blanket exemption" from wholesale standards, such as unbundled loop returns, CSRs, and like standards. (Ameritech Initial Brief at 26-30). Ameritech argues that the CLECs are asking the Commission to turn its back on the serious problems that have prevented thousands of consumers from effectively changing local service providers. Ameritech posits that CLECs are required by law to facilitate consumers' choices, citing 220 ILCS 5/13-513(5) and 13-514(6). (Ameritech Reply Brief at 12-13).

Ameritech points to testimony it proffered, of Ms. Spieckerman, that, in Ameritech's experience, the CLECs fail to timely provision CSRs 86% of the time. It concludes, therefore, that the Commission should impose the Rule's requirement that CSR returns must take place within 24 hours. Ameritech also cites the testimony of Staff and Ms. Spieckerman indicating that CLECs frequently fail to timely return loops, and, failure to return loops can result in delay and inefficiency. Ameritech proposes, however, that large (20 or more) orders involving loop returns the requirement should be 48 hours, instead of the current standard of 24 hours. (Ameritech Initial Brief at 27).

Ameritech further avers that failure to timely provide a Firm Order Confirmation is also problematic, as failure to timely provide such a document can delay the processing of an order or, it can result in a customer having to change telephone numbers. Ameritech seeks to impose a requirement on Level 4 carriers for firm order confirmations of 24 hours, with 48 hours for orders involving 20 or more lines. (*Id.* at 28-29).

Citing the testimony of AT&T witness Ms. Moore, Ameritech argues that the record does not contain evidence supporting Allegiance' contention that meeting the Level 4 requirements would require sophisticated systems and processes. (Ameritech Reply Brief at 13; Tr. 178-82). Ameritech maintains that if any carrier is truly too small or unsophisticated to provide support for instances in which its customers migrate to other carriers, that carrier probably should not have been granted a certificate of authority. (Ameritech Reply Brief at 14).

Commission Analysis and Conclusion

Subjecting Level 4 Carriers to Level 2 Performance Measures

The evidence in this docket is replete with facts establishing that it is not in the best interest of the ultimate consumers, or the carriers, to treat all carriers in the same manner. There is simply no evidence to justify treating Level 4 carriers, which are CLECs, the same as Level 2 carriers, that, by definition, are ILECS. The evidence established that Staff has carefully and thoughtfully crafted a Rule that ensures quality service to the end-user customer, without unduly burdening the carriers, through the use of a four-level approach.

Ameritech's contention that level 4 carriers have a "blanket exemption" from wholesale standards is incorrect. Sections 805 and 810 require unbundled loop returns, loss notification and CSRs of Level 4 carriers, to the extent those carriers provide those services. (Appendix, Secs. 805, 810). Section 815 imposes consequences for failure to timely provide those services. (*Id.* at 815). Therefore, Level 4 carriers do not have a "blanket exemption" from wholesale standards.

We also decline to adopt Verizon's proposal, which ignores altogether the need for different approaches for different carriers. Verizon' s argument that Level 4 carriers should incur Level 2 penalties lacks merit for several reasons. Verizon, a Level 1 carrier, is totally unaffected by the penalties imposed on Level 4 or Level 2 carriers. Therefore, it does not have standing to contest the penalties imposed on those carriers. (*People v. Malchow,* 193 Ill.2d 413, 425, 793 N.E.2d 433 (2000)). Moreover, while Verizon argues that carriers should not be subject to "disparate treatment," it cites no authority in support of this legal theory.

Finally, we have already determined that the record is replete with evidence establishing a rational basis for categorizing carriers in the Section of this order addressing Level 1 Wholesale Service Quality Plans (Sec. II(a)). The evidence established that currently, most Level 4 carriers do not provide much in the way of wholesale service. Also, CLECs' systems are different, generally, less elaborate, than those of Level 1 carriers. Thus, there is a rational basis for imposing less measures on Level 4 carriers and Verizon's disparate treatment contention fails.

The Arguments of Allegiance and other CLECs

The evidence demonstrated that Staff developed the Level 4 standards for simpler, manual transactions. Therefore, the CLECs' contention that they will have to purchase costly systems to comply with the performance measures is without merit. There is no evidence indicating that the CLECs are unable to meet these standards. We note that the Rule provides very limited and very simple measures and remedies. If the CLECs desire to compete with the ILECs, there is no reason why they should not be able to adhere to some performance measures so that end-users are assured of some minimal quality standards.

We disagree with Allegiance's contention that there is no current "problem" with regard to CLEC-ILEC migration, and therefore, Level 4 CLECs should not be required to provide the services required of Level 4 carriers. The evidence established that end-user customers suffer the inevitable consequences of untimely notification, such as getting billed by two carriers for the same time period.

As Staff points out, that the evidence established that amount of complaints it has received from the end-user customers regarding double-billing after switching carriers is alarming. Moreover, it is obvious that problems involved in switching carriers will involve CLEC activity; switching, in the context used here, can only be ILEC-CLEC, or *vice-versa*. We, therefore, shall not change the Rule with regard to Level 4 standards, except as is provided below.

With regard to MCI's argument that regulation of Level 4 carriers should be delayed until completion of the 13-state collaborative is completed, we note that this collaborate may not produce legal obligations on carriers. Moreover, WorldCom did not provide indicia as to when the collaborative would be completed. End-user consumers should not have to wait any further to have some assurance of performance quality.

Additionally, with regard to AT&T's arguments regarding benchmarks, as was stated with regard to Citizens' argument that 90% or 95% benchmarks should be imposed on Level 2 carriers, the evidence established that such benchmarks are not very accurate for lower volumes of transactions. (*See,* Sec. VI(b), herein). Also, customer end-user quality assurance is not benefited through the use of AT&T's threshold, Section 251 obligations. It makes little difference, if any, to the consumer if a Level 4 CLEC becomes subject to Section 251 requirements. Therefore, we decline to adopt AT&T's suggested threshold and its proposed benchmarks. In summation, we are not adopting any of the parties suggested changes regarding the imposition of Level 4 standards or remedies.

Ameritech's Arguments

While it could appear that Ameritech has no standing to make suggestions regarding the standards imposed on Level 4 carriers, the gist of its argument is that because a consumer has no idea what is causing a problem (*i.e.,* double-billing) for that consumer after a switch, Ameritech is required to "deal with the consequences" of untimely loop returns and the like. Ameritech has standing to address the measurement imposed, as those measurements have some impact on what situations Ameritech employees may have to "deal with."

Ameritech's proposal to amend the Rule to allow 48 hours for the return of 20 or more loops is well-taken. Section 810 is amended to provide:

> Level 4 carriers shall be subject to the following wholesale service measures and standards as provided below for the following services, to the extent the carrier offers or provides such services:

a.) Unbundled Loop Return <u>for less than 20 Loops</u> -within 24 hours
<u>for 20 or more loops-within 48 hours</u>

(*See,* Appendix, Sec. 810).

However, we decline to require Level 4 carriers to provide firm order confirmations at this time. Staff developed the Rule after extensive workshops were conducted and Staff is of the opinion that imposition of firm order confirmations is not warranted.

b.) Section 815 (Renumbered as 820): Conversion from Level 4 to Level 2

The Position of Allegiance

Section 820 requires conversion from Level 4 to Level 2 when a carrier has become obligated for services outside the scope of Level 4, or, when it has received a request for such services. Allegiance seeks to limit such conversion to situations in which Level 4 carriers become obligated to perform such services. Allegiance argues that it is unlikely that a CLEC (a level 4 carrier) would ever voluntarily agree to provide wholesale services to another carrier, if that CLEC would thus be subject to regulatory requirements regarding those services. Allegiance also contends that there is no good policy reason for applying Level 2 requirements to a Level 4 carrier when the Level 2 carrier has voluntarily agreed to provide services because there will always be a competitor with that CLEC—the ILEC. Allegiance also avers that the fact that a CLEC is providing wholesale service on a voluntary basis means, *ipso facto,* that the services will only be provided pursuant to an arm's length agreement that is mutually acceptable. (Allegiance Initial Brief at 12-15).

The Position of WorldCom

WorldCom argues that a petition for reclassification of a Level 4 carrier to a Level 2 carrier should be considered only if that Level 4 carrier's TA96 exemption is terminated. (*See,* 47 U.S.C Sec. 251(h)(2)). Stated another way, WorldCom desires to have the Rule provide for reclassification only when Level 4 carriers, CLECs, are required by law to provide the services in question, so that Level 4 carriers are prepared to offer those services. (WorldCom Initial Brief at 15).

Commission Analysis and Conclusions

We decline to change the Rule to allow for Level 4-Level 2 conversion only when a CLEC is legally required to provide the applicable services. We are not persuaded by the argument that the mere threat of regulation of the services in question would make most CLECs decline to voluntarily provide wholesale services. Other than being encumbered by regulation, the CLECs have not provided a reason for changing the Rule. We note that the CLECs have not provided evidence indicating that they are unable to comply with the Rule.

We also note that Section 820, which governs the conversion process, requires the Commission to consider several factors, such as the technical and economic feasibility of compliance with Level 2 Requirements and whether the benefits accrued justify the costs incurred in order to comply with Level 2 requirements. (Appendix, Sec. 820). Level 4-Level 2 conversion is not automatic, and it allows the CLECs to present evidence as to why it should not be held to Level 2 standards, resulting in an order that only requires compliance with some of the Level 2 requirements. (*Id.* at Sec. 820(b)).

Findings and Ordering Paragraphs

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) the Commission has jurisdiction over the subject-matter and of the parties herein;

(2) the recital of fact set forth in the prefatory portion of this order are supported by the record and are hereby adopted as findings of fact;

(3) the proposed Rules designated as 83 Ill. Adm. Code 731, as reflected in the attached Appendix, should be submitted to the Secretary of State to begin the first notice period;

IT IS THEREFORE ORDERED that the proposed rules designated as 83 Ill. Adm. Code 731, as reflected in the attached Appendix, shall be submitted to the Secretary of State pursuant to Section 5-40 of the Illinois Administrative Procedure Act.

IT IS FURTHER ORDERED that this order is not final; it is not subject to the Administrative Review Law.

DATED:	April 11, 2003
BRIEFS ON EXCEPTIONS DUE:	May 23, 2003
REPLY BRIEFS ON EXCEPTIONS DUE:	June 13, 2003

Claudia E. Sainsot
Administrative Law Judge